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1-14-08

No._____

In The

Supreme Court of the United States

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Petitioner,

v.

FERNANDO GARCIA.
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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This is a capital case.

QUESTION PRESENTED

Graham v. Collins declined to "read Penry [v. Lynaugh, 492 U.S. 302 (1989) ("Penry I"),] to effect a sea change in the Court's view of the constitutionality of the . . . Texas death penalty statute." 506 U.S. 461, 474 (1993). And just last term, in Abdul-Kabir v. Quarterman, the majority responded to the concerns of the dissent that new sentencing trials would now be required in every case, pointing out that "in several instances, we concluded, after applying the relevant law, that the special issues provided for adequate consideration of mitigating evidence." 127 S. Ct. 1654, 1672 & n.20 (2007). But this only means that there was no constitutional error. What of the cases, and there have been many, where constitutional error was found? Each time that has happened, a new sentencing trial has been ordered without a second thought.

With but one exception, this Court has consistently determined that jury charge error is mere trial error. No exception has been made for death-penalty cases. Nor has an exception been carved out for those death-penalty cases where the flaw in the instructions somehow impacts the jury's ability to give a "reasoned moral response" to the defendant's mitigating evidence. That notwithstanding, the question whether of Penry error can be amenable to a harmless-error analysis has not been squarely answered by this Court. See Smith v. Texas, 127 S. Ct. 1686, 1699 (2007) ("Smith II") (Souter, J., concurring). Although it might seem surprising that this would still be an open question nearly twenty years after Penry I was decided, consider that until the last term, outside of Penry I and Penry v. Johnson, 532 U.S. 782 (2001) ("Penry II"), none of the cases to come before the

Court resulted in a finding of constitutional error; therefore, it was entirely unnecessary to reach the question of whether a harmless-error analysis would even be appropriate.

The lower court, however, has determined that Penry error — jury-charge error — is structural error. Nelson v. Quarterman, 472 F.3d 287 (5th Cir. 2006) (en banc), cert. denied, 127 S. Ct. 2974 (2007). But this simply cannot be reconciled with the Court's well-established jurisprudence. Further, this Court has expressly held that a finding of constitutional error does not end the inquiry. Mindful of the principles underlying habeas review and the high costs of retrial, the Court instructed that a harm analysis must follow. Calderon v. Coleman, 525 U.S. 141, 503-04 (1998) (per curiam). See also Yates v. Evatts, 500 U.S. 391, 402 (1991); Rose v. Clark, 478 U.S. 570, 586 (1986). In the instant case, the lower court, bound by its earlier — and incorrect — holding in Nelson, refused to consider whether the Penry error was harmless.

The lower court's decision gives rise to an important question:

> Penry error is found when the Texas special-issue questions, approved of in an unbroken line of cases spanning more than three decades, create a reasonable likelihood that the jury was unable to give meaningful effect to the defendant's mitigating evidence. The result being that the death sentence may not reflect the jury's reasoned moral response to the evidence. Does this mean that Penry error is never amenable to the harmless-error analysis of Brecht v. Abrahamson, 507 U.S. 619 (1993)?

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OPINION BELOW

The court of appeals reversed the district court's denial of habeas corpus relief and remanded with instructions to grant the writ on October 15, 2007. PA 1:1-13 (Garcia v. Quarterman, No. 03-11097, 2007 WL 3005213 (5th Cir. 2007) (op. on reh'g) (per curiam) (unpublished)).[1]

JURISDICTION

The Director's petition for writ of certiorari is timely filed on or before January 14, 2008.[2] Sup. Ct. R. 13.3 (West 2007). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.

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[1] "PA" refers to the appendix to the instant petition for certiorari review. "Tr" refers the to transcript, the clerk's record of pleadings and documents filed in the trial court. "SF" refers to the "Statement of Facts," the reporter's record of transcribed trial proceedings. "SX" and "DX" refer to the State's exhibits and the defense exhibits, respectively, admitted into evidence during the trial. "SHTr" refers to the record of pleadings and documents filed during the state habeas proceedings.

[2] Because day ninety falls on Sunday, January 13, 2008, the time for filing a petition for writ of certiorari extends "until the end of the next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed." Sup. Ct. R. 30.1

STATEMENT OF THE CASE

I. Facts of the Crime

Garcia's guilt is not disputed. The evidence supporting the underlying capital-murder conviction was effectively summarized by the state court:

> The victim, three-year-old Veronica Rodriguez, was discovered missing sometime around 2:00 a.m. on Sunday, August 30, 1987, when her mother, Debbie Rodriguez, returned from an evening out with friends. After Rodriguez and Martin Barbosa [Rodriguez's fiancé] looked unsuccessfully around the house, they went out to the garage apartment where [Garcia] lived and asked if he had seen the child. [Garcia] replied that he had not, but would help them look for her. Before the three of them left to continue the search, [Garcia] padlocked the garage. Several hours later, the police were called. Officer Patrick Burke of the Dallas Police Department was dispatched to the residence at about 11:20 a.m. . . . to investigate the victim's disappearance. When Burke arrived he spoke with Rodriguez and Barbosa. He saw [Garcia] standing on the porch of the residence with two other men and, shortly thereafter, noticed [Garcia] walk off in an easterly direction. Burke conducted a walk-through search of the house and then proceeded to a nearby store to call his superiors[.]

Around 1:30 to 2:00 p.m., another patrol officer and Royce Dickey, a youth investigator, arrived at the home. By this time, Burke had conducted a thorough search of the house and canvassed the neighborhood, but still had not found the missing child. At this point, the officers expressed a need to look into the garage behind the house to determine whether the child might possibly have entered the structure somehow and then possibly been hurt. Barbosa told the officers that he owned both the house and the garage and that he had an agreement with [Garcia] that he could enter the garage whenever he wanted because he kept some of his property there. Barbosa then consented to the officers' search of the garage. However, Barbosa found that his key did not fit the padlock so he proceeded to break the door open. The officers conducted a cursory search of the garage including the inside of a refrigerator [because children sometimes hide inside them and become trapped]. Not finding anything on this initial search, Barbosa and the police exited the garage and continued the search elsewhere.

The youth division investigator, Dickey, returned to the residence the next morning, Monday, August 31[st], and asked Barbosa if he could search the garage. Again, Barbosa gave his consent. . . . [Garcia] had not been seen since the previous day when

> he allegedly agreed to aid in the search. When Dickey opened the garage door to initiate the second search, he smelled a familiar odor, leading him to believe a dead body was somewhere inside. On further investigation, Dickey found the body of the missing child wrapped in a blanket under [Garcia's] bed next to a wall of the garage. She had been sexually assaulted, beaten, and strangled. . . . [P]hotographs of the deceased take prior to the autopsy show[ed] bite marks and bruises[.]

Garcia v. State, 887 S.W.2d 846, 849-50 (Tex. Crim. App. 1994) (footnotes omitted).

II. The Punishment Trial

A. The State's case

The State's case on punishment focused on the gruesome crime and Garcia's prior criminal history. First, evidence was produced relating to a previous conviction for sexual abuse of a child. The victim was Diana Estrada, the five-year-old daughter of the woman Garcia was living with at the time, Rosa Maria Estrada. 20 SF 2709, 2746; 21 SF 2826-827, 2836-837, 2839-842; see also SX 92-93.[3] One afternoon, a neighbor, Estella Rangel, was at Garcia's apartment at the behest of

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[3] In addition to fondling the child and forcing her to perform oral sodomy on him, Garcia physically abused her, her mother, and her then eight year old brother, Roland Esquivel. 21 SF 2772, 2824-825, 2827-28, 2835

Diana's brother, to check on Diana. Rangel noticed that the little girl had "a lump as big as an egg . . . between her private part and her rectum." When Garcia arrived home and realized what was happening, he threatened Rangel by making a fist and coming toward her. 20 SF 2732, 2743-745. Rangel notified child welfare. Thereafter, whenever Garcia would see Rangel, he called her a snitch. 20 SF 2747; 21 SF 2856.

Caseworkers from the Texas Department of Human Services ("DHS") who were assigned to the case testified that Garcia denied any sexual or physical abuse, even after the allegations were confirmed by the victim. Indeed, Garcia characterized the allegations as "a big joke" and "ludicrous." He said further he would not have sexually abused anyone "because he was now a born-again Christian, that he was waiting for the rapture to come." 20 SF 2754; see also 21 SF 2770, 2779. However, he ultimately agreed to leave the home, as it was in Diana's best interest. 20 SF 2754-755, 2761. A subsequent visit revealed that Garcia was still living at the apartment. Although he insisted he had other living arrangements, he was evasive when asked to provide specific details. 21 SF 2768-770.

For this crime, Garcia was originally sentenced to probation.[4] On May 14, 1982, after only seven months,

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[4] This was over the negative report of the probation officer who evaluated Garcia and prepared the pre-sentence report. During the interview, Garcia admitted committing sexual abuse, but said "he was drunk . . . and did not realize what he was doing." 21 SF 2777. Garcia also admitted to routine marijuana use from ages thirteen to nineteen and "sniffing paint on a monthly basis from age 16 to 19." Probation was not recommended because the offense was heinous, Garcia continued to deny any wrongdoing, and his "prognosis for rehabilitation is extremely guarded to poor." *Id.* at 2779-781.

his probation was revoked, and Garcia was sentenced to two years in prison. 20 SF 2707-708; SX 92. Subsequently, on March 7, 1983, Garcia was released to parole, but he was again sent back to prison, this time after only two months, having committed the offense of burglary of habitation with the intent to commit sexual assault.[5] 20 SF 2707-10, 2714-718; SX 91, 94. In the early morning hours of April 28, 1983, Garcia broke into the apartment of George Merenue. Merenue's girlfriend was awakened by someone pulling at her shorts. She testified that she felt "somebody's tongue lapping on my buttocks," and the intruder "had his finger . . . in me." He tried to push her onto her back but ran away when Merenue awoke. 20 SF 2721-725.

For this crime, Garcia was sentenced to ten years in prison. 20 SF 2702; SX 91.[6] After serving three years, he was released to parole on July 1, 1986. 20 SF 2712; SX 94. Little more than one year later, on August 30, 1987, he would savagely attack and murder three-year-old Veronica Rodriguez. 20 SF 2712-13; see also SX 95.

The State ended its case with the testimony of Dr. Betty Schroeder. She had evaluated Garcia in 1981 at the request of the Bexar County Probation Office. 21 SF 2783-784. Initially, Garcia denied the charge of sexual abuse, "indicat[ing] he felt that the welfare people had brainwashed the child into making various accusations,

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[5] The charge was reduced to simple burglary in exchange for Garcia's guilty plea. *See* SX 91.

[6] Among the details revealed, the jury learned that Garcia had some adjustment problems. During an interview with a psychologist, Garcia said he was "disgusted and angry with blacks and others who engage in homosexual acts." 20 SF 2711-12; SX 94.

that they had actually coached the child into saying that he had sexually abused her."[7] Id. at 2786. As to his background, Garcia

> indicated that he was adopted at birth, and he never really knew his natural father. Apparently his grandparent's (sic) adopted him. His grandfather died prior to his birth. At that point, his adopted mother was 81 years old . . . and lived with his brother and subsisted on Social Security. Apparently he had two natural brothers, one natural sister.

Id. at 2785.

Garcia stated that he had dropped out of high school in the tenth grade. Id. Indeed, Dr. Schroeder testified that Garcia's "academic abilities were somewhat diminished." However, testing indicated he had above normal intelligence and an I.Q. of 110.[8] 21 SF 2786-787. Further, Garcia admitted to Dr. Schroeder that he had smoked marijuana and sniffed spray paint in the past, but insisted that he had not done either for the six months prior to November, 1981. She testified that his drug use, nevertheless, "strongly suggested some addictive propensities." Id. at 2785-787.

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[7] Garcia made a similar accusation to one of the caseworkers, saying he felt like someone "had gotten to the children." 20 SF 2770-771.

[8] On cross-examination, Dr. Schroeder opined that Garcia "probably could have achieved much more had he stayed in school and had some encouragement in that direction." 21 SF 2796.

Finally, Dr. Schroeder testified that Garcia was a pedophile, "an individual who resolves his sexual excitation, his urges for sex mainly through the use of small children, fondling to actual sexual intercourse[.]" 21 SF 2792; see also id. at 2802-803. Because of this, she concluded that Garcia's prognosis for rehabilitation was "extremely guarded to poor. . . .

> Individuals who are pedophiles, in fact, any kind of a psychiatric/psychological pathology that emerges from the basic human primary drives such as the drive to eat, drink, have sex, . . . one of the primary human drives, are very, very resistant to change. Even the best of psychotherapists, behaviorists, all the range of individuals find it very difficult to penetrate and aid the individual dealing with this kind of pathology.

21 SF 2790-791; see also id. at 2805. She said that in prison, where presumably he would have no contact with children,[9] Garcia would find other ways of expressing his pedophiliac urges, through "fighting, viciousness, anger, depression." Id. at 2805.

B. The defense's case

The defense's case in mitigation began with the cross-examination of Dr. Schroeder. On cross-examination, she testified that Garcia "did not have the

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[9] Dr. Schroeder admitted that Garcia could, theoretically, have access to children despite being incarcerated because children were allowed face-to-face visits. 21 SF 2808.

usual nurturing [the love and discipline that a father and a mother give to a child] that one would hope that a young child would have and did not have the kind of encouragement toward formal education." 21 SF 2794. Additionally, she elaborated on Garcia's level of achievement in school, stating that he read at a sixth-grade level, and his math skills were that of a fifth grader. Id. at 2796. Dr. Schroeder opined that Garcia had only reached the tenth grade as a result of having been socially promoted from grade to grade. Id. at 2798.

Dr. Schroeder also discussed the side effects of inhalant abuse, testifying that she had observed erratic and psychotic behavior in teenagers who had engaged in such behavior. She said the chemicals that are ingested attack the neurological system and often cause permanent and irreversible damage. Id. at 2799-800. Further, she admitted having more hope that someone who was both a substance abuser and a pedophile could be rehabilitated because oftentimes, such a person would not act on his impulses unless intoxicated. Id. at 2801. Ultimately, Dr. Schroeder said that her "experience has been that sociopaths, psychopathic personalities such as this tend to conform well to the structure of the penal system and usually do not commit other violent acts within this particular structure." Id. at 2807.

In its case-in-chief, the defense re-called Estella Rangel. She knew Garcia because the two had lived in the same housing project; however, she did not get to know him until he began living with Rosa Estrada. Id. at 2847-849. Rangel described seeing Garcia dressed as a woman on several occasions in 1979. She said that on those occasions, Garcia would get into a waiting car where he and the driver, another man, would kiss. Id. at

2849-851. Additionally, Rangel testified that she had seen Garcia sniffing paint more than once. Specifically, she had seen him doing this before he would abuse Rosa's daughter.[10] Id. at 2853.

The defense also called its own expert to testify, Dr. Robert Powitzky. At the outset of his testimony, he agreed with Dr. Schroeder's diagnosis that Garcia was a pedophile. Id. at 2861; see also id. at 2875. But the family history Garcia described to Dr. Powitzky differed markedly from that he had given to Dr. Schroeder:

> [H]e was abandoned by his mother to be adopted by his grandmother.
> They . . . didn't really abuse him, but pretty well neglected him and pretty well ignored him and also exposed him to some witchcraft and other kinds of bizarre . . . experiences.
>
> When his mother would come to visit him, she would take him away. As far back as he could remember, on occasion she would come back and would get herself and him and her boyfriend intoxicated, and they would all have sex together. First it started with him just being in the bed while they were having sex, and graduated to where they all were sexual together.

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[10] Rangel had testified for the State that she had witnessed Garcia abuse Diane Estrada on several occasions, but she was afraid of saying anything or intervening "because he was on spray." 20 SF 2746.

> And he was forced to perform oral sex at the age of five on his older brother's friend, forced by his older brother at the age of six to perform oral sex. Abused . . . at the age of eight by a [fourteen-year-old] cousin, a female cousin, who had him perform oral sex on her. Third grade was taken for a few weekends by a nun that ostensibly convinced the grandmother that she wanted to help him with confirmation class. And . . . she sexually abused him for a couple of weekends.

Dr. Powitzky admitted he was unable to verify any of this information. Id. at 2861-863. Nevertheless, he explained that male victims of sexual abuse tend to react by acting out, reclaiming the power after the "total helplessness of being sexually abused by someone . . . trusted and loved as a child." Id. at 2867. He also said rage is very common, as is confusion about sexual identity. Id.

While he believed Garcia would be a danger to free society, because he would once again turn to drugs and alcohol and in turn, probably abuse more children, Dr. Powitzky did not believe Garcia would be a threat to prison society. Id. at 2869. Prison records indicated Garcia had not had any major disciplinary problems during his prior incarcerations.[11] Moreover, he opined that when Garcia was sober, and presumably he would be sober in prison, "he's much, much less of a danger to anybody." Finally, like Dr. Schroeder, Dr. Powitzky

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[11] Notably, however, Garcia was disciplined for possession of contraband: three tubes of glue. When asked for an explanation, Garcia contended that the glue was not "toxic." *See* SX 91.

explained that his experience indicated "that pedophiles tend to be the more passive and the, quote, the better behaved inmates." Id. Indeed, he explained that Garcia would probably be the one in danger in prison. Id. at 2871; see also id. at 2880, 2882. Dr. Powitzky did not believe Garcia would abuse "a fresh-faced 18 year old boy that looks like he's about 10" if prison officials were to place such an inmate with him because his preferred victims were young girls. Id. at 2881, 2882.

Ultimately, Garcia admitted to him that he had sexually abused Rosa Estrada's five-year-old daughter by forcing her to perform oral sex on him. Id. at 2864. As to the burglary charge, however, Dr. Powitzky testified that "Garcia had . . . minimized that. He sort of said, 'I was drunk and sort of stumbled into a bed. There was a woman in it, and she screamed rape.'" Id. at 2865. And regarding the facts of this offense, on cross-examination, Dr. Powitzky testified that Garcia "stated that he only had flashes of memory of that, that he recalled only taking the girl from the house. Basically, he recalled being on top of her. The next thing he could remember was waking up and finding her in bed with him and putting her under the bed."[12] Id. at 2876.

At the conclusion of its case, the defense offered into evidence Garcia's school records, medical records pertaining to an attempted suicide, and selected records of his prior incarcerations and the parole board. Id. at

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[12] But he denied committing the murder entirely in a conversation with Rosa Estrada, telling her that he had been "in a very smart organization which the only way I could get out is dead. But they did frame me with this murder. It's going to be very hard for me to prove otherwise." 21 SF 2878-879; SX 105, DX 3

2888; DX 1-2, 5-6.

C. The jury charge

Pursuant to state law, Garcia's jury was charged with answering two special issue questions:

> Was the conduct of the defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would occur?[13]
>
> Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?[14]

Tr 198-99; see Tex. Code Crim. Proc. art. 37.071 (West 1987). The trial court also provided the jury with a supplemental instruction:

> You are instructed that you shall consider any evidence which, in your opinion, mitigates against the imposition of the death penalty. In making this determination you shall consider any aspects of the defendant's background, character or record and the facts and circumstances of the offense. If you believe from the evidence that the State has proven

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[13] This is the "deliberateness" special issue.

[14] This is the "future dangerousness" special issue.

> beyond a reasonable doubt that the answers to the Special Issues are "Yes," but you are further persuaded by the mitigating evidence that the defendant should not be sentenced to death in this case, or you have reasonable doubt as to whether the death penalty should be imposed against the defendant, then you shall answer one or both of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed in this case.

Tr 199-200.[15]

D. Arguments of counsel

The State's sole concern was convincing the jury that they had proven both deliberateness and future dangerousness beyond a reasonable doubt. See 21 SF 2903-911, 2927-928, 2930-933. As to deliberateness, the State argued in part:

> After everybody went to bed, after quietness had settled like a fog over a river, [Garcia] walks through the front door. He didn't bust out a window trying to hop through the window. He didn't continuously clang on the back door trying to get in that door because he knew it was locked. He walked in that front door. Martin Barbosa's right there on the couch asleep. Walked back to where he knew [Veronica] would be and

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[15] This instruction is substantially similar to the "nullification instruction" at issue in *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*").

> picked her up. Opened and unlocked the back door, closed it and locked it from behind, and took her to only where he knew they would be alone.
>
> Not like some crazy mad man hollering and bumping the walls and raping the victim just wherever he finds the victim. He took [Veronica] back, and you know what he did to her under the blanket regardless.
>
> That's deliberation. Not an accident. Not a mistake. He just didn't stumble into that place, and it just happened right there. He did what he wanted to do, and he wanted to do what he did.

Id. at 2904.

And as to future dangerousness, the State summarized the numerous chances Garcia had been given to become a productive member of society, emphasizing that "he has manipulated the system all down the line, and he has scratched every person's back that could help him or hurt him." Id. at 2909.

Defense counsel's argument, while inartful, makes plain that the theory of punishment case was to make the jury understand that Garcia had not acted deliberately:

> We are asking you in question [number one] what his state of mind was. Did he do this act deliberately? We told you it wasn't premeditated, didn't mean premeditated. We told it meant more than

intentional. That is the guidance we gave you. What else could it be if it's not deliberate? I don't know. I can't make any sense out of this crime.

At what point on that night did Fernando Garcia decide to end poor Veronica's life. At what point did he say to himself that she must die. There are so many different ways one human being can be inhumane to another. I don't want to list them and describe them or go through them.

I want to look at what Fernando had done in the past. We know that Fernando had sexually abused children before, little girls. We know that Fernando had hit women, beaten Rosa, hit and beaten young boys, Roland, hit and beaten little girls. At what point when he was hitting or strangling poor Veronica, did he decide she must die? I don't know. You are going to have answer that based on what you know. Did he do it deliberately? Does he do anything deliberately?

Well, you have deliberated in this case. You have done something deliberately. You have sat and sifted through the evidence, looked at things and come up with a conclusion. You have deliberated.

Did he deliberate that night? Did he perform his awful sexual act on her and sit

> down and decide what to do, and then decide that she must die? He had never done that before. He had hit other children that had not died. He had suffocated Rosa's children. They had not died.
>
> When did he decide? When did he deliberate? Only you can answer that question.

21 SF 2919-920.

III. Direct Appeal and Postconviction Proceedings

Garcia was convicted of capital murder and sentenced to death for the vicious sexual assault and murder of three-year-old Veronica Rodriguez. His conviction and sentence were affirmed on direct appeal by the Texas Court of Criminal Appeals. Garcia v. State, 887 S.W.2d 846, cert. denied, 514 U.S. 1005 (1995). Addressing Garcia's claim that the jury instructions were constitutionally inadequate under Penry I, the court held that because he had received a "Penry" instruction that directed the jury to consider the defendant's character and background in determining whether to impose life or death, Garcia was not entitled to any additional instructions. Id. at 860.

Garcia reasserted his Penry claim during the state habeas proceedings. The state habeas court concluded that even with the supplemental instruction, there was not "a reasonable likelihood that the jury interpreted [its] instruction[s] in such a way that prevent[ed] the consideration of . . . relevant mitigating evidence." SHTr 114 (citing Boyde v. California, 494 U.S. 370 (1989);

Johnson v. Texas, 509 U.S.350, 367-68 (1993)). After adopting the findings and conclusions of the trial court, the Court of Criminal Appeals denied Garcia's application for a state writ of habeas corpus. Ex parte Garcia, No. 45,875-01 (Tex. Crim. App. 2001) (unpublished order).

IV. Federal Habeas Corpus Proceedings

In his petition for federal habeas relief Garcia again alleged, inter alia, that the trial court's instructions prevented the jury from considering and giving effect to his mitigating evidence. After adopting the magistrate judge's finding that Garcia's evidence was not "constitutionally relevant" because he had not established a "uniquely severe permanent handicap," the district court denied relief. Garcia v. Dretke, No. 3:01-CV-580-G (N.D. Tex. 2003) (citing Robertson v. Cockrell, 325 F.3d 243 (5th Cir. 2003) (en banc)). But based on this Court's grant of certiorari review in Smith v. Dretke, 539 U.S. 986 (2003),[16] and Tennard v. Dretke, 540 U.S. 945 (2003), Garcia was granted a certificate of appealability on the single issue of whether "the trial court violated [his] federal constitutional rights under the Eighth and Fourteenth Amendments by charging the jury with a 'nullification' instruction which failed to give effect to [his] mitigating evidence."

Thereafter, this Court issued its opinion in Tennard v. Dretke, 542 U.S. 274 (2004). Tennard dismantled the "constitutional relevance" test employed by the district court and established by the Fifth Circuit,

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[16] When the State commuted Smith's sentence, the petition was dismissed as moot. *Smith v. Dretke*, 541 U.S. 913 (2004)

holding that it "has no foundation in the decisions of the Court. Neither Penry I nor its progeny screened the mitigating evidence for 'constitutional relevance' before considering whether the jury instructions comported with the Eighth Amendment." 542 U.S. at 284. The Court then emphasized that mitigating evidence presented in a capital case need only be relevant, that is, if the evidence has "'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without it,'" it is relevant. Id. (quoting McKoy v. North Carolina, 494 U.S. 433, 440-41 (1990) (internal quotation marks and citation omitted)).

After a thorough review of the evidence, the lower court's original opinion affirmed the denial of federal habeas relief:

> We are presented here with a situation in which the defense counsel's theory of the case was that the evidence should be considered for its relevance under the deliberateness special issue and not for additional mitigating effect. On habeas review, the petitioner argues that the special issues limited the jury's ability to give mitigating effect to the evidence, but it was defense counsel's theory that imposed the limits on the jury. Because the jury was able to give effect to the evidence as presented, there is no Penry violation. Our holding is a narrow one, specific to the facts of this case where defense counsel did not present the evidence for its mitigating effect and instead expressly asked the jury not to

> sympathize with Garcia. Contrary to the dissent's somewhat hyperbolic suggestions, we do not hold that relevant mitigating evidence should be ignored, nor that a mitigation theory is even required. We do, however, believe we are required to review the case was actually presented to the jury.

PA II: 18-19 (Garcia v. Quarterman, 456 F.3d 463, 472 (5th Cir. 2006)).

While the case was pending on rehearing, this Court decided Abdul-Kabir v. Quarterman, 127 S. Ct. 1654, and Brewer v. Quarterman, 127 S. Ct. 1706 (2007). In those cases, the Court held that Penry error occurs when there is a reasonable likelihood a jury is not permitted to give "meaningful effect" or a "reasoned moral response" to a defendant's mitigating evidence. Abdul-Kabir, 127 S. Ct. at 1675; Brewer, 127 S. Ct. at 1710, 1712. The Court noted that "[t]he former [Texas] special issues provided an adequate vehicle for the evaluation of mitigating evidence offered to disprove deliberateness or future dangerousness." Abdul-Kabir, 127 S. Ct. at 1670. The special issues can also satisfy the Eighth Amendment "when mitigating evidence has only a tenuous connection — 'some arguable relevance' — to the defendant's moral culpability." Id. at 1668 n.14. However, Abdul-Kabir explained that the "evidence of childhood deprivation and lack of self-control did not rebut either deliberateness or future dangerousness but was intended to provide the jury with an entirely different reason for not imposing a death sentence," i.e.,"his violent propensities were caused by factors beyond his control -- namely, neurological damage and childhood neglect and abandonment." Id. at 1661, 1672.

Similarly, "Brewer's mitigating evidence served as a 'two-edged sword' because it tended to confirm the State's evidence of future dangerousness as well as lessen his culpability for the crime." Brewer, 127 S. Ct. at 1712.

Further, the special issues failed in Abdul-Kabir because they were "undermined" by prosecutorial argument "that the law compels [the jury] to disregard the force of evidence offered in mitigation." 127 S. Ct. at 1673. The Brewer opinion reached the same conclusion. While Brewer's mitigating evidence lessened his culpability for the crime, it also tended to confirm the State's evidence of future dangerousness because the prosecutor urged the jury to "disregard[] any independent concern that, given Brewer's troubled background, he may not be deserving of a death sentence." Brewer, 127 S. Ct. at 1712. Thus, "a juror considering [Abdul-Kabir]'s evidence . . . or Brewer's evidence of mental illness, substance abuse, and a troubled childhood could feel compelled to provide a 'yes' answer to the [future dangerousness] question, finding himself without a means for giving meaningful effect to the mitigating qualities of such evidence," rather than "accept the suggestion . . . that his brief spasm of criminal activity . . . was properly viewed . . . as an aberration that was not likely to be repeated." Abdul-Kabir, 127 S. Ct. at 1673 & n.23 (emphasis in original). It was this overly aggressive prosecutorial argument that distinguished Abdul-Kabir and Brewer from Johnson v. Texas and Graham v. Collins, 506 U.S. 461 (1993). Id.

In light of these opinions, the court below reversed the denial of habeas relief, granted the writ and remanded for a new sentencing trial. PA 1:2, 13. The court determined that the instructions given in this case

may not have allowed the jury to give meaningful effect to Garcia's mitigating evidence of substance abuse and neglect and abuse during childhood.[17] PA I:9-12. In conclusion, the lower court noted that Brecht's harmless-error analysis governs "virtually all" other collateral challenges to state court convictions, but whether "some types of Penry error" come under that umbrella was an open question. PA I: 12-13.

REASONS FOR GRANTING THE WRIT

Constitutional error is not, and should not be, taken lightly. Even more so in the context of a death-penalty case. But this Court has never shied away from allowing harmless-error analysis in those cases, even where as here, the flaw in the instructions can be construed as creating a reasonable likelihood that the jury was precluded from considering and giving effect to the defendant's mitigating evidence.

Over twenty-one years ago, Garcia visited unspeakable horrors on three-year-old Veronica Rodriguez. He had a constitutionally fair trial that resulted in the imposition of the death penalty. In the time that he has been on death row, this Court has determined that the instructions given to his jury at the close of the punishment trial can violate the Eighth Amendment. This is so because in some cases, the jury

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[17] The court did conclude, however, that Garcia's good character evidence — that he was a born-again Christian and had not had any serious problems during previous incarcerations — was clearly within the purview of the future-dangerousness special issue. PA I: 9-10 (citing *Abdul-Kabir*). The lower court also again rejected Garcia's argument that his diagnosis as a pedophile was in any way mitigating and stated that it "does not meet even the low threshold of relevance set by [*Tennard*]." PA I: 9 n.5.

is unable to give meaningful effect to certain types of mitigating evidence; thus, the death sentence would not necessarily reflect the jury's "reasoned moral response." But underlying this "moral response" is nothing more than the jury's determination that, at the end of the day, the mitigating evidence did not outweigh the aggravating evidence. Regardless, as between trial error and structural error, this jury-charge error is simple trial error, and as such, it is amenable to harmless-error analysis.

In the instant case, the lower court applied Abdul-Kabir and Brewer to find the jury might have been precluded from considering and giving effect to Garcia's mitigating evidence of substance abuse and childhood abuse and neglect. Then bound by the holding of Nelson — and in clear contravention of this Court's precedents — it made no determination of harm. But as the record fairly shows, in this case, the constitutional error did not have a "substantial and injurious effect or influence" on the verdict.

I. A Determination of Penry Error Rests on a Finding that there Exists a Reasonable Likelihood the Jury was Precluded from Considering and Giving Effect to the Defendant's Mitigating Evidence. Such Jury-Charge Error Can Only be Trial Error, Thus Giving Rise to the Question of Harmlessness.

It has long been settled that "trial error" is that which has "occurred during the presentation of the case to the jury, and . . . may therefore be qualitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless."

Arizona v. Fulminante, 499 U.S. 279, 207-08 (1991). The Fulminante Court recognized that "most constitutional errors can be harmless." Id. at 306. See also United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2564 (2006). And as the Court explained in Neder v. United States, "'[i]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis.'" 527 U.S. 1, 8 (1999) (quoting Rose, 478 U.S. at 579); see also id. at 9.

Structural defects, on the other hand, are different and exceedingly rare because, with those errors, "[t]he entire conduct of the trial from beginning to end is . . . affected." Fulminante, 499 U.S. at 309-10. In this way, then, structural defects "'defy analysis by "harmless-error" standards' because they "affec[t] the framework within which the trial proceeds," and are not 'simply an error in the trial process itself.'" Gonzalez-Lopez, 126 S. Ct. at 2564 (quoting Fulminante, 499 U.S. at 309-10) (alterations in original). Indeed, the Court has only found structural error in six discrete instances. See Tumey v. Ohio, 273 U.S. 510 (1927) (biased trial judge); Gideon v. Wainwright, 372 U.S. 335 (1963) (denial of counsel); Vasquez v. Hillery, 474 U.S. 254 (1986) (racial discrimination in grand-jury selection); McKaskle v. Wiggins, 465 U.S. 168 (1984) (denial of self-representation at trial); Waller v. Georgia, 467 U.S. 39 (1984) (denial of public trial); Sullivan v. Louisiana, 508 U.S. 275 (1993) (defective reasonable-doubt instruction). As the Court concluded in Rose:

> Placed in context, the erroneous . . . instruction does not compare with the kinds of errors that automatically require reversal

> of an otherwise valid conviction . . . [because] the error in this case did not affect the composition of the record. Evaluation of whether the error prejudiced [the defendant] thus does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence. Consequently, there is no inherent difficulty in evaluating whether the error prejudiced respondent in this case.

478 U.S. at 579-80 & n.7 (citations omitted).

A. This Court has nearly unequivocally held jury-charge error to be trial error.

Consistent with these principles, most jury-charge errors have been held to be trial errors subject to harmless-error analysis. See Washington v. Recuencco, 126 S. Ct. 2546 (2006) (failure to submit sentencing factor to jury); Mitchell v. Esparaza, 540 U.S. 12 (2003) (per curiam) (instruction omitted element of offense); Neder (instruction omitted element of offense); Calderon v. Coleman, 525 U.S. 141 (1998) (misleading jury instruction); Clemmons v. Mississippi, 494 U.S. 738 (1990) (state court invalidated aggravating factor as a matter of state law after the verdict); Carella v. California, 491 U.S. 263, 266 (1989) (erroneous conclusive presumption in jury instruction); Pope v. Illinois, 481 U.S. 497, 501-04 (1987) (jury instruction contained wrong constitutional standard); Rose (instruction improperly shifted burden of proof on element of crime). But see Sullivan (improper definition of "beyond a reasonable doubt" nullifies verdict and results in structural error).

Garcia's jury was charged according to state law at the time of his trial: the special issues asked the jury to consider Garcia's future dangerousness and the deliberateness of his actions. Additionally, Garcia's jury, having been empaneled shortly after Penry I was decided, was given the supplemental instruction later found to be an inadequate remedy in Penry II. This is classic jury charge error. See Smith II, 127 S. Ct. at 1699 (Alito, J., dissenting) ("The federal constitutional error that occurred in the penalty phase of petitioner's trial and that was identified in Smith v. Texas, 543 U.S. 37 [] (2004) (per curiam) [], concerned a flaw in the jury instructions[.]"). As such, it is properly classified as trial error.

B. That Penry error arises in the context of death penalty case does not magically transform such garden-variety trial error into structural error.

This Court's Eighth Amendment jurisprudence demands that a capital sentencing jury not be precluded from considering, as a mitigating factor, the character and record of the individual offender, as well as the circumstances of the particular offense. This ensures that the jurors will be able to give their "reasoned moral response" to the defendant's mitigating evidence. E.g., Penry II, 532 U.S. 782; Penry I, 492 U.S. 302; Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978) (plurality op.). In Texas, when the jury is so precluded, this gives rise to Penry error. But the Court has not hesitated to find these types of jury instruction problems amenable to harmless-error analysis. The lower court, on the other hand, has carved a new

exception out of whole cloth: "moral judgements" are not subject to harmless-error review. Nelson, 472 F.3d at 314-15 & n.8.

In a major departure from this Court's general rule that jury-charge error is trial error, even where the death penalty has been imposed, the court below suggests that Penry error should be structural error. Id. Nelson relied principally on the absence of any harm analysis — and the lack of any suggestion that harm analysis might be appropriate — from the Penry line of cases. Id. at 314 (citing Tennard, 542 U.S. 274; Penry II, 532 U.S. 782; Penry I, 492 U.S. 302). This absence, the court explained rests on

> the recognition that Penry error deprives the jury of a "vehicle for expressing its 'reasoned moral response' to the defendant's background, character and crime," which precludes it from making "'a reliable determination that death is the appropriate sentence.'" Penry II, 532 U.S. at 797 [] (quoting Penry I, 492 U.S. at 328 []) (internal quotation marks omitted) (emphasis added). This reasoned moral judgment that a jury must make in determining whether death is the appropriate sentence differs from those fact-bound judgments made in response to the special issues.

Id. at 314-15 (emphasis in original).

As an initial matter, the absence of something does not make the opposite true. That aside, in deciding as it

did, the lower court wholly ignored that the "reasoned moral response" is nothing more than a factual determination that, in the minds of the jurors, the defendant's mitigating evidence did not overcome whatever aggravating factors were at play, including but not limited to, the facts of the crime and the defendant's prior criminal history. Especially instructive is this Court's determination that Hitchcock[18] error can be harmless. See Singletary v. Smith, 507 U.S. 1048 (1993) (granting certiorari and remanding to appellate court in light of recent opinion in Brecht).

At issue in Hitchcock was a Florida statute limiting the mitigating circumstances a jury or judge could consider to only those enumerated. 481 U.S. at 395-96. While defense counsel argued to the jury that "it was to 'look to the over picture . . . consider everything together . . . consider the whole picture, the whole ball of wax," the prosecutor insisted that the jury was to "consider the mitigating circumstances and consider those by number.'" Id. at 398 (internal citations omitted). Further, the trial judge instructed the jurors that they were to consider only those aggravating and mitigating circumstances as allowed for by state law. Id. This violated the Eighth Amendment:

> We think it could not be clearer that the advisory jury was not instructed to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of Skipper v. South

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[18] *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

> Carolina, 476 U.S. 1 [] (1986), Eddings v. Oklahoma, 455 U.S. 104 [], and Lockett v. Ohio, 438 U.S. 586 [].

Id. at 398-99. No meaningful difference exists between the law invalidated in Hitchcock and the Texas special issues found to be inadequate in Penry I, Abdul-Kabir, and Brewer.

C. The conclusion that the jury instructions created a reasonable likelihood of misapplication does not end the inquiry.

When a claim involves jury instructions in capital-sentencing proceedings, the relevant inquiry is whether there is a reasonable likelihood the jury applied them in such a way that precluded consideration of the defendant's mitigating evidence. Boyde, 494 U.S. at 380; see also Abdul-Kabir, 127 S. Ct. at 1673-674; Smith II, 127 S. Ct. at 1698; Estelle v. McGuire, 502 U.S. 62, 72 & n. 4 (1991); Nelson, 472 F.3d at 311. In its original opinion, the lower court noted that this analysis unnecessary. PA II: 18 n.13 (Garcia v. Dretke, 456 F.3d at 472 n.13). No mention of this analysis at all was made in the opinion on rehearing. PA I: 1-13.

But as Calderon explained, even where a Boyde analysis has been made, a federal habeas court must go one step further:

> Although the Boyde test for constitutional error, like the Brecht harmless-error test, furthers the "strong policy against retrials years after the first trial where the claimed

> error amounts to no more than speculation." 494 U.S. at 380 [], it is not a substitute for the Brecht harmless-error test. The Boyde analysis does not inquire into the actual effect of the trial error on the jury's verdict; it merely asks whether constitutional error has occurred.

525 U.S. 146-47.

This Court has been very clear when concluding constitutional error required automatic reversal. See, e.g., Gonzalez-Lopez, 126 S. Ct. at 2564 ("[E]rroneous deprivation of the right to counsel of choice, . . . qualifies as 'structural error.'"); Sullivan, 508 U.S. at 281-82 (denial of trial by jury due to a defective reasonable doubt instruction "unquestionably qualifies as structural error"); Vasquez, 474 U.S. 263-64 ("[D]iscrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review."). But with respect to Penry error, no such suggestion, much less a plan statement, has ever been made despite numerous opportunities to do so. For good reason: because Penry error, like all other trial errors, does not require automatic reversal and is thus subject to harmless-error analysis.

II. In spite of the Penry Error in this Case, the Record Does Not Support a Finding that the Error had a "Substantial and Injurious Effect or Influence" on the Verdict.

Brecht v. Abrahamson mandates that the standard of review for harm should be "whether the error 'had a substantial and injurious effect or influence in

determining the jury's verdict.'" 507 U.S. at 637 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). See also Fry v. Pliler, 127 S. Ct. 2321 (2007). This means that "a harmlessness finding requires 'fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.'" Id. at 2330. (Stevens, J., concurring in part and dissenting in part) (quoting Kotteakos, 328 U.S. at 765).

The policies underlying Brecht's harmless-error standard are "the State's interest in the finality of convictions," comity, and federalism during collateral review. 507 U.S. at 635. Where Penry error would result in a new sentencing trial after nearly twenty years, the interests of justice certainly warrant application of Brecht. Granting habeas relief after so long merely because there is a reasonable likelihood the jury's verdict was negatively affected by a now-repealed sentencing statute is "at odds with the historic meaning of habeas corpus — to afford relief to those whom society has 'grievously wronged.'" Id. at 637. Such a decision has significant societal costs, "including the expenditure of additional time and resources for all the parties involved, the 'erosion of memory' and 'dispersion of witnesses' that accompany the passage of time and make . . . retrial more difficult, and the frustration of 'society's interest in the prompt administration of justice.'"[19] Id. (quoting United

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[19] Similarly, a cost-benefit analysis is part of any analysis under *Teague v. Lane*, 488 U.S. 289 (1989). And the Court has found that the costs of retroactive application generally, and almost certainly will outweigh the benefits. *See Sawyer v. Smith*, 497 U.S. 227, 242-43 (1990); *see also McKlesky*, 499 U.S. at 490 (observing that when a habeas petitioner is granted a new trial, the "erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a

States v. Mechanik, 475 U.S. 66, 72 (1986)). Therefore, the interests of justice — finality, comity, and federalism — strongly favor consideration of whether any Penry error had a "substantial and injurious effect or influence" on the verdict."[20] Id.

In the instant case, there is no doubt the instructions given to the jury were unconstitutional under both Penry I and Penry II. But the state courts did not recognize the constitutional error, much less apply any sort of harm analysis. The Fry Court explained it is nevertheless the duty of the federal habeas court to conduct a harm analysis. 127 S. Ct. at 2328. Even so, the lower court did not conduct a harm analysis because whether such is applicable where there is Penry error has not been decided by this Court. It is nevertheless appropriate for this Court to consider whether the Penry error in this case was harmless. See Yates, 500 U.S. at 407 ("[W]e have the authority to make our own assessment of the harmlessness of a constitutional error in the first instance.") (citation omitted); Rose, 478 U.S. at 407 ("[W]e 'plainly have the authority' to decide whether, on the facts of a particular case, a constitutional error is harmless under the Chapman [v. California, 386 U.S. 18 (1967)] standard.") (citing United States v.

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reliable criminal adjudication." (citation omitted)). In this context, habeas review "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Duckworth v. Egan*, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring).

[20] Importantly, the *Nelson* court did not even pay lip service to the concerns and principles on which the harmless error analysis relies. 472 F.3d at 314-15; *see also id.* at 331-37 (Dennis, J., concurring and assigning additional reasons).

Hastings, 461 U.S. 499, 510 (1983)).

Here, the evidence established that Garcia physically and sexually assaulted children and adults alike. His proclivities affected those he lived with and complete strangers, too. Garcia lied and made myriad excuses for the abuse; he was a recidivist devoid of remorse. Most disturbing, however, was the apparent escalation of his urges toward little girls. He sexually abused five-year-old Diana Estrada in a manner heinous enough to produce a "lump as big as an egg . . . between her private part and her rectum." And then having been given a place to stay by Veronica's mother and her fiancé, Garcia repaid that act of kindness by mauling the three-year-old, coolly abducting her in the middle of the night to sexually abuse her. Veronica suffered thirteen bite marks over her tiny body and a savage beating before she was strangled to death. No claims of being a born-again Christian could diminish that. No addiction to inhalants or alcohol could soften the impact. Nor could any evidence of childhood abuse or neglect. Assuming, as we must, that the jury considered this evidence, it would doubtless be offset by the source (Garcia alone in almost every instance), quality (completely uncorroborated hearsay), and quantity (scant little).

This Court has placed special emphasis on the fact that Texas juries are aware of the consequences of their actions and are thus "likely to weigh mitigating evidence as it formulates these answers in a manner similar to the one employed by capital juries in 'pure balancing states.'" Johnson, 509 U.S. at 370-71 (quoting Franklin v. Lynaugh, 487 U.S. 164, 182 n.12 (1988) (plurality op.)). Garcia's jury was likewise aware, as it was instructed that an affirmative answer to both special issues would

result in the imposition of the death penalty and a negative answer to one would result in a life sentence.

The responsibility foisted upon jurors in a capital murder trial is serious. We cannot blithely assume they do not take it seriously. The Lockett Court presumed that "'jurors . . . confronted with the awesome responsibility of decreeing death for a fellow human [would] act with due regard for the consequences of their decision.'" 438 U.S. at 598 (quoting McGautha v. California, 402 U.S. 183, 208 (1971)). Nothing in the record suggests the jury in this case acted in a contrary manner. And ultimately, even taking into account the flawed special issue questions and the inadequate supplemental instruction, nothing in the record suggests that the death sentence imposed reflects something less than the jury's "reasoned moral response." The Eighth Amendment was thus not offended.

CONCLUSION

For the foregoing reasons, this Court should grant the Director's petition for writ of certiorari.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

Supreme Court, U.S.
FILED

No. 4

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In The

Supreme Court of the United States

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Petitioner,

v.

FERNANDO GARCIA,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-11097

Fernando Garcia,

Petitioner-Appellant,

v.

Nathaniel Quarterman, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent-Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:01-CV-580

Before JONES, Chief Judge, and BENAVIDES and CLEMENT, Circuit Judges. PER CURIAM: *

Petitioner Fernando Garcia appealed the district court's denial of his habeas corpus petition, and this court previously denied relief. Because recent decisions from the Fifth Circuit and the Supreme Court establish that Garcia's Eighth Amendment rights

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5THCIR. R. 47.5.4.

were violated by the trial court's failure to present to the sentencing jury an adequate vehicle to give meaningful mitigating effect to his history of substance abuse and an abused childhood, we grant Garcia's motion for rehearing, vacate the prior panel opinion, reverse the district court's decision, and remand with instructions to grant habeas relief.

The following opinion is substituted for the panel's prior opinion, reported at 456 F.3d 463 (5th Cir. 2006).

I. BACKGROUND

With extraordinary cruelty, Garcia sexually abused and murdered a three year-old girl in 1987.[1] Garcia was convicted of murder by a Texas jury and sentenced to death on December 9, 1989. His conviction was affirmed in the state courts and certiorari was denied by the U.S. Supreme Court. After exhausting his state court habeas remedies, Garcia filed a federal habeas petition in 2001. He argued, inter alia, that the trial court violated his Eighth Amendment rights because the "special issue" jury instructions given at the punishment phase of the trial prevented the jury from considering and giving full effect to his mitigating evidence. The district court denied Garcia's petition for writ of habeas corpus but granted him a Certificate of Appealability. This court denied relief in a divided ruling.

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[1] For the facts surrounding this heinous crime see *Garcia v. State*, 887 S.W.2d 846, 849-50 (Tex. Crim. App. 1994).

While Garcia's petition for rehearing was pending, in a separate case our court held en banc that the relevant inquiry in these cases is "whether there was a reasonable likelihood that the jury would interpret the Texas special issues in a manner that precluded it from fully considering and giving full effect to all of the defendant's mitigating evidence." *Nelson v. Quarterman*, 472 F.3d 287, 293 (5th Cir. 2006). Shortly thereafter, the Supreme Court handed down two decisions on this same question. *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007); *Brewer v. Quarterman*, 127 S. Ct. 1706 (2007). In Abdul-Kabir, the Supreme Court synthesized its various rulings on the Texas special issues to explain that its precedent "firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." 127 S. Ct. at 1664. In light of these recent authorities, we re-evaluate Garcia's appeal.

Garcia's case in mitigation in the trial court rested on his background and character. A psychiatrist who examined Garcia for the purposes of assessing his future danger to the community testified that he did not have a stable, nurturing family and was poorly educated. He also had a long history of drug abuse, including using inhalants which can induce psychotic behavior and lead to permanent neurological damage. Indeed, the jury heard testimony from Garcia's neighbor who stated that she saw him sniff paint and molest a small girl while he was high.

Finally, another doctor testified about Garcia's background and pedophilia. He described what information Garcia relayed to him about his disturbing

childhood: raised by his grandmother who exposed him to witchcraft and other odd practices; drugged by his mother so he would have sex with her and her boyfriend; forced to perform oral sex at the age of five on a friend of his brother's and at six on his brother; forced to perform oral sex at the age of eight on a fourteen-year-old female cousin; and sexually abused by a nun. Although he could not verify the veracity of these stories,[2] the doctor described how this sort of childhood could cause pedophilia in an adult. Garcia also admitted to the doctor that he had sexually abused another young girl, who was five years old.

The doctor clinically diagnosed Garcia as a dangerous pedophile who would probably molest children again if given the opportunity.

The jury received written instructions from the trial court designed to allow it to give effect to the mitigating evidence. The Charge of the Court in the sentencing phase set forth the Texas special issues and instructed the jury to answer "yes" or "no" to each one, applying the reasonable doubt standard. Special Issue No. 1 reads: "Was the conduct of the defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?" The instructions defined "deliberately" for the jurors: "Deliberately is not linguistically equivalent to intentionally and is more than intentionally and less than premeditated; it is a conscious decision involving a thought process which embraces more than mere will to engage in conduct." Special Issue No. 2 reads: "Is there a probability that the defendant

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[2] The trial court did not reach the question whether this testimoney was inadmissible hearsay, because the state did not object to it.

would commit criminal acts of violence that would constitute a continuing threat to society?"

The court also informed the jury through a "nullification instruction" that it could answer "no" to the special issues, even if the proper answer were "yes":

> You are instructed that you shall consider any evidence which, in your opinion, mitigates against the imposition of the death penalty. In making this determination you shall consider any aspects of the defendant's background, character or record and the facts and circumstances of the offense. If you believe from the evidence that the State has proven beyond a reasonable doubt that the answers to the Special Issues are "Yes," but you are further persuaded by the mitigating evidence that the defendant should not be sentenced to death in this case, or you have a reasonable doubt as to whether the death penalty should be imposed against the defendant, then you shall answer one or both of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed in this case. Mitigating circumstances are circumstances which do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.

The jury answered "yes" to the special issues and the court sentenced Garcia to death.

II. LEGAL STANDARDS

"In reviewing a ruling on the merits of a habeas claim, the district court's findings of fact are reviewed for clear error; its conclusions of law, de novo." *Schaetzle v. Cockrell*, 343 F.3d 440, 443 (5th Cir. 2003). The Antiterrorism and Effective Death Penalty Act of 1996 supplies the proper standards for reviewing the state court ruling. *See* 28 U.S.C. § 2254. See also *Jones v. Dretke*, 375 F.3d 352, 353-54 (5th Cir. 2004). As to legal issues, the statute provides that the habeas corpus petition should not be granted unless the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "[A] state court decision is . . . contrary to [the Supreme] Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Supreme Court's] . . . ." *Williams v. Taylor*, 529 U.S. 362, 405 (2000). "A state court decision constitutes an unreasonable application of clearly established law if the 'state court identifies the correct governing legal rule from [the Supreme Court's] cases but unreasonably applies it to the facts of the particular state prisoner's case.'" *McCall v. Dretke*, 390 F.3d 358, 363 (5th Cir. 2004) (quoting Taylor, 529 U.S. at 407-08). "[F]ederal habeas courts must deny relief that is contingent upon a rule of law not clearly established at the time the state conviction becomes final." *Peterson v. Cain*, 302 F.3d 508, 511 (5th Cir. 2002).

III. DISCUSSION

The Supreme Court has dictated "that a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigate against imposing the death penalty." *Penry v. Lynaugh*, 492 U.S. 302, 318 (1989) (hereinafter *Penry*, or *Penry I*). Specifically, in Penry, the Supreme Court found that the Texas special issues may not have permitted the jury to give adequate effect to "the mitigating evidence of Penry's mental retardation and history of abuse." 492 U.S. at 323. In *Abdul-Kabir*, the Court interpreted *Penry* to require that juries be permitted to give "meaningful effect" to almost all types of mitigating evidence. 127 S. Ct. at 1675.

A. The Nullification Instruction

To correct the special issues' inadequacies identified by the Supreme Court in *Penry I*, Texas courts temporarily adopted a "nullification instruction," like the one presented to the jurors in the instant case. Such an instruction permits the jurors to answer "no" to one of the special issues, even though the proper answer is "yes," if they nonetheless believe that the death penalty is not warranted. In *Penry II*, the Supreme Court found this innovation insufficient. *See Penry v. Johnson*, 532 U.S. 782, 798-804 (2001).

The Court identified two flaws in the special issues nullification instruction in *Penry II*. First, it reasoned that the instruction could be read as a gloss on the special issues, rather than as a vehicle to override them. *See id.* at 798. Thus, the jury might have believed that it was

still required to give "truthful answers to each special issue," even in light of other mitigating factors. *Id.*[3] Second, even if the jury did properly understand the nullification instruction as allowing it to override the special issues, it was in a position where "it would have been both logically and ethically impossible for a juror to follow both sets of instructions." *Id.* at 799.

The instruction in the instant case was different from the instruction the Court held unconstitutional in *Penry II*. For instance, the instruction to Garcia's jury did not contain the language that Justice O'Connor worried could "be understood as telling the jurors to take Penry's mitigating evidence into account in determining their truthful answers to each special issue." *Id.* at 798. Rather, the jury instructions here state clearly that, even "[i]f you believe . . . that the answers to the Special Issues are 'Yes,'" you "shall answer one or both of the Special Issues 'No' in order to give effect to your belief that the death penalty should not be imposed in this case" (emphasis added).

However, the nullification instruction here still has the second flaw identified in *Penry II* – it requires jurors to answer a special issue untruthfully in order to give effect to the mitigating evidence. See id. at 802. Although "[a] clearly drafted catchall instruction on mitigating evidence . . . might have complied with *Penry I*," in this case, "jurors . . . [still] had to answer the special issues

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[3] The instruction Justice O'Connor complained of as ambiguous in *Penry II* read, in part, "If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues." 532 U.S. at 798-99 (emphasis in original; quotations omitted).

dishonestly in order to give effect to . . . mitigating evidence." *Id.* at 802-03. Thus, the trial court's additional "'clarification' provided no real help." *Id.* at 802.[4]

Furthermore, the trial court's clarification of the word "deliberately" did not permit the jurors to give effect to any additional mitigating evidence.

Indeed, the court's definition of "deliberately," provided above, is less than artful. And, in any event, the instruction simply did not "defin[e] the term . . . 'in a way that would clearly direct the jury to consider fully [petitioner's] mitigating evidence as it bears on his personal culpability.'" *Id.* at 803 (quoting *Penry I*, 492 U.S. at 323).

Thus, in order for us to find that the jury had the opportunity to give meaningful effect to Garcia's mitigating evidence, we must determine that the two special issues, standing alone, are constitutionally sufficient.

B. Garcia's Mitigating Evidence

For the sake of clarity, we divide the mitigating evidence presented by Garcia at the sentencing hearing into three categories: (1) evidence of Garcia's "good

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[4] Both the Supreme Court and this Circuit have indicated in recent opinions that requiring jurors to return false answers in order to give effect to mitigating evidence violates the defendant's constitutional rights. *See Smith v. Texas*, 543 U.S. 37, 48 (2004); *Bigby v. Dretke*, 402 F.3d 551, 572 (5th Cir. 2005) (stating that "even if the jur[ors] understood the instruction as directing them to 'nullify' their answers to the special issues, they still would have faced the ethical dilemma of violating their oath to render a 'true verdict' by providing false answers to the special issues in order to give effect to Bigby's mitigating evidence and comply with the supplemental instruction").

character"; (2) evidence of substance abuse; and (3) evidence of neglect and abuse during childhood.[5]

For evidence of good character, the jury could have considered Garcia's claim that he was a born-again Christian and the fact that during previous incarcerations he had not been responsible for any serious disciplinary violations. The law on this issue is clear. *Abdul-Kabir* did not alter the Supreme Court's ruling in Franklin v. Lynaugh that evidence of good character can be given sufficient mitigating effect by the second special issue. See *Franklin v. Lynaugh*, 487 U.S. 164, 177-78 (1988); accord *Graham v. Collins*, 506 U.S. 461, 466 (1993).

The same cannot be said for Garcia's evidence of substance abuse in light of *Abdul-Kabir* and *Brewer*. It is possible Garcia's substance abuse could have been given some mitigating effect under the first special issue. Garcia claimed that he had a long history of substance abuse and often committed his sex crimes when he was high. It appears that Garcia was in a narcotic-induced, altered state when he murdered his victim. The jury could have found that the drugs prevented Garcia from having the deliberative state necessary for it to answer "yes" to the first special issue. Nevertheless, Garcia's substance abuse might also have had "meaningful mitigating relevance beyond its tendency to disprove that [Garcia] acted deliberately." *Coble v. Quarterman*, 496 F.3d 430, 447 (5th Cir. 2007).

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[5] Garcia also argues that his pedophilia may be considered mitigating of his moral culpability. We reject this argument. In contrast to the abuse Garcia himself suffered as a child, pedophilia is not a mitigating personal characteristic and does not meet even the low threshold of relevance set by *Tennard v. Dretke*, 542 U.S. 274, 284-85 (2004).

Likewise, the possibility that Garcia's substance abuse might function as a "two-edged sword" in the minds of the jury renders the special issues insufficient. *See Brewer*, 127 S. Ct. at 1712 n.5, 1714. If the jury believed Garcia could stem his substance abuse, it could have found him to be less of a future danger under the second special issue. On the other hand, a jury convinced that Garcia's habitual substance abuse made him all the more dangerous would be left without an alternate vehicle for considering whether it nonetheless made him less culpable. *See Coble*, 496 F.3d at 447-48.

The same is true of Garcia's evidence of his abused childhood. The Supreme Court has conclusively stated that childhood abuse cannot be given meaningful mitigating effect under the special issues. The sort of childhood abuse in Garcia, if believed, has meaningful similarities to that suffered by *Penry*. In *Penry I*, the Court found that the Texas special issues did not permit the jury to give proper mitigating effect to the defendant's "abused background." 492 U.S. at 315. The Court described the evidence of this abuse as follows: "Penry's sister testified that their mother had frequently beaten him over the head with a belt when he was a child. Penry was also routinely locked in his room without access to a toilet for long periods of time." *Id.* at 309. The abuse described in *Penry I* is sufficiently similar in mitigating effect to Garcia's such that the trial court, having the benefit of the Supreme Court's recent *Penry I* opinion, should have given it independent mitigating effect. *See* also *Brewer*, 127 S. Ct. at 1712 n.5, 1714 (noting that evidence of an abused childhood could be "two-edged").

Further, the *Penry I* Court treated Penry's history of abuse as something with independent mitigating effect:

> Penry argues that his mitigating evidence of

> mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its "reasoned moral response" to that evidence in determining whether death was the appropriate punishment. We agree. Thus, we reject the State's contrary argument that the jury was able to consider and give effect to all of Penry's mitigating evidence in answering the special issues without any jury instructions on mitigating evidence.

492 U.S. at 322 (emphasis added). At no point in the opinion does the Court remark that it is only because Penry is mentally retarded that his past history of abuse was not given sufficient mitigating effect under the special issues. *Abdul Kabir* confirms this as the "clearly established" law enunciated by *Penry I*.

In light of *Penry I* and *II*, *Abdul-Kabir* and *Brewer*, the state court's ruling that the special issues in this case were constitutionally sufficient was contrary to the Supreme Court's precedent or, alternatively, an unreasonable application of clearly established law.

The original majority opinion in this case determined that Garcia could not avail himself of *Penry*-related arguments concerning his background because he did not argue to the jury for mercy and, in fact, foreswore seeking "mercy." In light of the conclusiveness with which the Court has now rejected limitations on the *Penry* doctrine and has declared as "clearly established law" only those limitations embodied

in the facts of specific cases,[6] we must retract our earlier view. A juror who credited Garcia's evidence of an abused background and believed that his childhood, or his substance abuse, made him less culpable could not, under *Abdul-Kabir*, have given effective voice to this conclusion through the special issues in this case.

That this instructional error mandates reversal of the death sentence follows from *Abdul-Kabir* and our en banc decision in *Nelson v. Quarterman*, 472 F.3d 287 (5th Cir. 2006). Neither of those decisions, however, alters the basic rule that for "virtually all" other collateral challenges to state court convictions the appropriate standard of review is the "substantial and injurious effect" harmless error test found in *Brecht v. Abrahamson*. *See Fry v. Pliler*, 127 S. Ct. 2321, 2325 (2007) (citing *Brecht*, 507 U.S. 619, 631 (1993)). Moreover, the question whether some types of *Penry* error might be subject to harmless error review has not been squarely decided by and remains unresolved by the United States Supreme Court. *Smith v. Texas*, 127 S. Ct. 1686, 1699 (2007) (Souter, J., concurring).

IV. CONCLUSION

For these reasons, the district court's judgment denying habeas relief is REVERSED, and the case is REMANDED with instructions to grant the writ and require a resentencing of Garcia within a reasonable time to be determined by the district court.

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[6] *See Abdul-Kabir*, 127 S. Ct. at 1667-73 (recognizing limitations as stated in *Franklin v. Lynaugh*, 487 U.S. 164 (1988); *Graham v. Collins*, 506 U.S. 461 (1993); *Johnson v. Texas*, 509 U.S. 350 (1993)).

APPENDIX II

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-11097

Fernando Garcia,
Petitioner-Appellant,
versus

Nathaniel Quarterman, Director
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent-Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:01-CV-580

Before JONES, Chief Judge, and BENAVIDES and CLEMENT, Circuit Judges.

EDITH H. JONES, Chief Judge:

This appeal raises questions concerning whether a petitioner is entitled to a new sentencing hearing for capital murder based on the Supreme Court's *Penry* line of cases,[1]

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[1] *Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 109 S. Ct. 2934 (1989); *Penry v. Johnson (Penry II)*, 532 U.S. 782, 121 S. Ct. 1910 (2001); *Tennard v. Dretke*, 542 U.S. 274, 124 S. Ct. 2562 (2004); *see also Smith v. Cockrell*, 311 F.3d 661 (2002).

whose purpose is to afford effective jury consideration of evidence mitigating a defendant's moral culpability. The district court granted COA on this sole issue, after rejecting the others petitioner raised. After careful review, we conclude that Garcia has failed to meet the standards governing habeas relief under AEDPA.

I. Background

Around 2:00 a.m. on Sunday, August 30, 1987, Debbie Rodriguez ("Rodriguez") returned from an evening out with friends to discover her three-year old daughter, Veronica, missing. [2] After Ms. Rodriguez and her fiancee, Martin Barbosa ("Barbosa"),[3] could not find the young girl inside the house, they went to the garage apartment behind the house and asked Fernando Garcia ("Garcia"), who was renting the apartment from Barbosa, whether he had seen Veronica. Garcia replied that he had not seen the girl and offered to help search for her. As the three left the area to move back toward the house, Garcia padlocked the apartment behind them. Ultimately, the police were called.

Officer Patrick Burke of the Dallas Police Department was dispatched to the residence around 11:20 a.m. to investigate Veronica's disappearance. When Officer Burke arrived, he spoke to Rodriguez and Barbosa. He saw Garcia standing on the porch of the

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[2] This account of the facts is derived primarily from the decision of the Texas Court of Criminal Appeals, *Garcia v. State*, 887 S.W.2d 846 (Tex. Crim. App. 1994).

[1] Rodriguez and her two children lived with Barbosa at the time of the crime. Barbosa's parents actually owned the house, but there was no question that Barbosa had lived there his entire life and exercised present control of the property at the relevant time.

residence with two other men and, shortly thereafter, noticed Garcia walk off in an easterly direction. Burke conducted a walkthrough search of the house and then went to a nearby store to call his superiors. Because the case involved a child under ten years of age, the department would assign an officer to the case until Veronica was found.

Sometime between 1:30 and 2:00 p.m., Royce Dickey, a youth investigator, arrived at the scene. By the time Dickey arrived, Officer Burke had conducted a thorough search of the house and canvassed the neighborhood, but still had not found the missing child. After discussing the status of the investigation, the officers expressed a need to look in the garage behind the house to determine whether Veronica might have entered the structure and hurt herself. Barbosa explained to the officers that he owned both the house and the garage, and that he had an agreement with Garcia that he could enter the garage whenever he wanted because he kept some of his own property there. Barbosa then consented to the officers' search of the garage. However, when he went to unlock the garage door, Barbosa discovered that his key did not fit the padlock Garcia had placed on it earlier that morning. Barbosa then broke the door open. The officers conducted a cursory search of the garage. After this initial search, the officers and Barbosa found nothing, so they exited the garage and continued the search elsewhere.

The next morning, Monday, August 31, Investigator Dickey returned to the residence and asked Barbosa if he could again search the garage. Barbosa again consented. The garage had remained open since the previous day when Barbosa had broken the lock. Garcia had not been seen since the previous day, when he had supposedly promised Barbosa and Rodriguez to aid

in the search. When Investigator Dickey opened the garage door to initiate a second search, he immediately detected the odor of a dead body. Upon further investigation, Dickey found the body of young Veronica wrapped in a blanket under Garcia's bed next to a wall of the garage. She had been brutally secually assulated, bitten twelve times, severely beaten with blunt force to the head, and strangled. Garcia was arrested and charged with capital murder. A Texas jury convicted him and recommended a sentence of death on December 8, 1989. The state trial court imposed this sentence pursuant to Texas law. After exhaustin his state court remedies, [4] Garcia filed the instant petition for habeas corpus, which the district court denied. The district court granted a COA on Garcia's *Penry* Claim.

II. Discussion

A. Standard of Review

The district court granted Garcia a COA on a single issue: whether the trial court violated Garcia's Eighth and Fourteenth Amendment rights by charging the jury with a "nullification" instruction which failed to

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[4] In the Texas Court of Criminal Appeals, Garcia argued, inter alia, that the Texas death penalty jury instructions were inadequate to afford him a meaningful opportunity to give effect to his proffered mitigating evidence. *Garcia v. Texas*, 887 S.W.2d at 860-61. The Texas Court of Criminal Appeals upheld his conviction in light of a supplemental jury instruction similar to that given and rejected by the Supreme Court in *Penry II*, 532 U.S. at 802-04, 121 S. Ct. at 1923-24. On state habeas review, Garcia argued instead that the supplemental instruction is constitutionally infirm, a contention rejected on grounds of procedural bar and then-binding precedent. *Penry II* later vindicated Garcia's contention.

give effect to his mitigating evidence. As this court has recently stated, to obtain relief Garcia must demonstrate: (1) that his mitigating evidence had relevance beyond the special issues, and (2) that his mitigating evidence was beyond the reach of the jury. *See Bigby v. Dretke*, 402 F.3d 551, 564-65 (5th Cir. 2005)(reformulating this circuit's *Penry I* test in light of *Tennard v. Dretke*, 542 U.S. 274,124 S. Ct. 2562 (2004)).

As Garcia filed his petition for federal habeas relief after April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") governs this appeal. Under AEDPA,

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .

28 U.S.C. § 2254(d). The Supreme Court has explained that a state court decision is "contrary to" federal law where the state court applies a rule that "contradicts the governing law set forth [in Supreme Court precedent];" a state court decision will also be contrary to federal law where, confronting facts that are "materially indistinguishable" from those in controlling Supreme Court precedent, the state court nevertheless reaches an opposite result. *Williams v. Taylor*, 529 U.S. 362, 405-06, 120 S. Ct. 1495, 1519-20 (2000). A state court is said to

have made an "unreasonable application" of federal law where it identifies "the correct governing legal principle from [the Supreme Court] but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413, 120 S. Ct. at 1523.

However, the fact that a habeas court would have reached a different conclusion than did the state court is insufficient to merit habeas relief. *Woodford v. Visciotti*, 537 U.S. 19, 27, 123 S. Ct. 357, 361 (2002). The Court in *Williams* was careful to note that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law," and as such, the state court's application of federal law must be "objectively unreasonable," as opposed to merely incorrect, for habeas relief to be granted. *Williams*, 529 U.S. at 409-10, 120 S. Ct. at 1521-22 (emphasis in original); *see also Penry v. Johnson* (*Penry II*), 532 U.S. 782, 793, 121 S. Ct. 1910, 1919 (2001). Notwithstanding erroneous reasoning of state courts, we review the reasonableness of their ultimate decision. *Neal v. Puckett*, 286 F.3d 230, 236 (5th Cir. 2002)(en banc), *cert. denied*, 537 U.S. 1104, 123 S. Ct. 963 (2003).

B. Amenability of Garcia's Mitigating Evidence to Jury Consideration

The issue Garcia poses is whether his sentencing violated the Supreme Court's *Penry* line of cases, which have focused on the inability of the former Texas death penalty issues to allow the jury adequately to consider and give effect to certain mitigation evidence at sentencing. Garcia's evidence may be divided into several categories: (a) childhood sexual abuse and bizarre upbringing, (b) pedophilic condition, and (c) drug and alcohol abuse. To put this evidence in perspective, the

State's evidence, as well as Garcia's response to the State's case, is relevant.

During the punishment phase, the State focused on the facts of the grisly crime and Garcia's criminal history. First, the State put forward evidence relating to Garcia's previous conviction for sexual abuse of a child, which he committed on May 5, 1981. The victim was Diana Estrada, the five-year old daughter of a woman Garcia was living with at the time, Rose Maria Estrada. One afternoon, Diana's brother asked a neighbor, Estella Rangel, to come by Garcia's apartment to check on the young girl. Rangel soon noticed that little Diana had "a lump as big as an egg . . . between her private part and her rectum." 20 RR 2734. When Garcia arrived home and realized what was happening, he threatened Rangel. Rangel notified child welfare. Thereafter, whenever Garcia would see Rangel, he would call her a snitch.

Caseworkers from the Texas Department of Human Services ("DHS") investigated the case. After a full investigation, DHS concluded that Garcia had fondled Diana and forced her to perform oral sodomy on him. Additionally, Garcia physically abused Diana, her mother, and her then-eight-year old brother, Roland Esquivel.[5] When questioned during the investigation, Garcia denied any sexual or physical abuse, even after Diana confirmed the allegations. Garcia characterized the allegations as "a big joke" and "ludicrous." Garcia invoked a religious transformation to bolster his denial: He explained to DHS personnel that he was a born-again Christian. While continuing to assert his innocence,

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[5] The State introduced this evidence through the testimony of Esther Diaz and Mel Villareal of the DHS, as well as through the testimony of the individuals involved, Diana Estrada, Rosa Marie Estrada, and Roland Esquivel.

Garcia ultimately agreed to leave the home. However, follow-up visits by DHS indicated that he was still living in the apartment, and Garcia proved evasive when questioned about the exact whereabouts of his new residence.

Against the recommendation of the probation officer, Garcia was originally sentenced to probation for these crimes beginning April 16, 1982. The probation officer's notes and presentence report are prescient. During his interview, Garcia admitted engaging in the lewd acts, but claimed that "he was drunk . . . and did not realize what he was doing." 21 RR 2777. Probation was not recommended because the offense was heinous, Garcia (apparently convinced his voluntary intoxication negated his acts) continued to deny any wrongdoing, and his "prognosis for rehabilitation is extremely guarded to poor." *Id.* at 2780.

On March 7, 1983, Garcia was paroled. Less than two months later, Garcia was charged with another sexual offense. In the early morning hours of April 28, Garcia broke into the apartment of George Merenue. Merenue's girlfriend, who was asleep, was awakened by someone pulling at her shorts and fondling her. Garcia tried to push her onto her back, but ran away when she fully awoke. For these acts, Garcia was charged with the offense of burglary of a habitation with the intent to commit sexual assault.[6] He was sentenced to ten years in prison, then paroled after serving only three years. He absconded from the halfway house to which he had been

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[6] The State reduced the charge to simple burglary in exchange for Garcia's guilty plea. Garcia's parole for the conviction for sexual abuse of a child was revoked on these grounds.

assigned.[7] Within a year, Garcia committed the horrific crime underlying the instant case.

In addition to his prior crimes, the State introduced the testimony of Dr. Betty Schroeder. She had evaluated Garcia in 1981at the request of the Bexar County Probation Office. Garcia initially denied all of the child abuse charges and claimed the DHS investigators "had brainwashed the child into making various accusations, . . . had actually coached the child into saying that he had sexually abused her." 21 RR 2770. When she asked Garcia about his background, he indicated that he had been adopted at birth and never really knew his natural father. Additionally, Garcia told Dr. Schroeder that he had dropped out of high school in the tenth grade. Schroeder testified that Garcia's "academic abilities were somewhat diminished" but confirmed that he had above normal intelligence and an IQ of 110. Garcia told Schroeder that he had smoked marijuana and sniffed spray paint in the past, but he denied having used either for six months before November 1981. Schroeder testified that Garcia's prior drug use "strongly suggested some addictive propensities." *Id.* at 2787.

Dr. Schroeder further testified that Garcia was a pedophile. She defined "pedophile" as "an individual who resolves his sexual excitation, his urges for sex mainly through the use of small children, fondling to actual sexual intercourse." 21 RR 2792. Schroeder characterized Garcia's likelihood for rehabilitation as:

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[7] Garcia had committed numerous other violations of the rules of his parole. Garcia failed to submit monthly reports in April, May, July, and August 1987; he further failed to report public intoxication offenses committed March 8, 1987, and July 17, 1987.

> extremely guarded to poor. . . . Individuals who are pedophiles, in fact, any kind of a psychiatric/psychological pathology that emerges from the basic human primary drives such as the drive to eat, drink, have sex, . . . are very, very resistant to change. Even the best of psychotherapists, behaviorists, all the range of individuals find it very difficult to penetrate and aid the individual dealing with this kind of pathology.

21 RR 2791. Dr. Schroeder added that even within the confines of prison, secreted away from children, Garcia would express his pedophilic urges through "fighting, viciousness, anger, depression." *Id.* at 2805. According to Dr. Schroeder, pedophiles tend to "grow more violent, more heinous as time goes on." *Id.* at 2792.

It is critical to focus on the facts, arguments, and mitigation theory Garcia *actually made* to the jury before we address his new arguments in federal court. Garcia's mitigation effort began with the cross-examination of Dr. Schroeder. On cross, she testified that Garcia "did not have the usual nurturing [from his parents] that one would hope that a young child would have and did not have the kind of encouragement toward formal education." 21 RR 2794. She "hypothesized" this aspect of Garcia's upbringing based on her experience that "[o]ften times individuals such as this have also been sexually abused as children or had a great deal of abnormality in that area in their rearing." *Id.* at 2795. Concerning his progression in school, she conceded that Garcia most likely reached the tenth grade only because of social promotion. Defense counsel also elicited testimony amplifying Garcia's substance abuse, as well as

Schroeder's opinion that she had observed erratic and psychotic behavior in teenagers who abused drugs or alcohol. Schroeder also testified that she was more optimistic that a substance-abusing pedophile could be rehabilitated than a pedophile who acts out without being intoxicated because it is possible that once the substance abuse is controlled, the pedophile may not act on his urges. Finally, Dr. Schroeder opined that in light of Garcia's past behavior in prison, he would likely conform to the prison environment and would not present a future danger to prison society. At the beginning of its penalty phase case-in-chief, the defense recalled Estella Rangel. She testified that she first knew Garcia when he began living with Rosa Estrada. Rangel described seeing Garcia cross-dressing on several occasions in 1979; when he dressed in this manner, Garcia would get into a waiting car where he and the driver (also a man) would kiss. Rangel further testified that she had seen Garcia sniffing paint more than once. Rangel stated that she had seen Garcia sniff paint on at least one occasion immediately before he abused Rosa's daughter. Rangel also cited Garcia's paint-sniffing habit as one of the reasons she was afraid of intervening in his abuse of Diane Estrada, which Rangel had witnessed on several occasions.

Garcia also called Dr. Robert Powitzky, a clinical psychologist specializing in sexual abuse. Like Dr. Schroeder, Dr. Powitzky diagnosed Garcia as a pedophile. However, Dr. Powitzky had a much lengthier, and in fact much different, account of Garcia's family history. His most pertinent testimony is as follows:

> [Garcia] was abandoned by his mother to be adopted by his grandmother. They . . . didn't really abuse him, but pretty well neglected him and pretty well ignored him and also

> exposed him to some witchcraft and other kinds of bizarre . . . experiences. When his mother would come to visit him, she would take him away. As far back as he could remember, on occasion she would come back and would get herself and him and her boyfriend intoxicated, and they would all have sex together. First it started with him just being in the bed while they were having sex, and graduated to where they all were sexual together. And he was forced to perform oral sex at the age of five on his older brother's friend, forced by his older brother at the age of six to perform oral sex. Abused . . . at the age of eight by a 14 year old cousin, a female cousin, who had him perform oral sex on her. Third grade was taken for a few weekends by a nun that ostensibly convinced the grandmother that she wanted to help him with confirmation class. And . . . she sexually abused him for a couple of weekends.

Dr. Powitzky conceded that he could not verify any of this information. However, he testified that male victims of sexual abuse tend to respond by acting out, reclaiming a sense of power after the "total helplessness of being sexually abused by someone . . . trusted and loved as a child." *Id.* at 2867. Feelings of rage and confusion as to sexual identity are also common in child sex abuse victims.

Dr. Powitzky then testified that Garcia would be a danger to free society because he would again resort to substance abuse and engage in further child abuse. However, Powitzky also asserted that Garcia would not

be a danger to prison society. Garcia's prior positive disciplinary record in prison, coupled with the sobriety required of prisoners, would result in Garcia's being "much, much less of a danger to anybody." Moreover, Dr. Powitzky asserted that, in his experience, pedophiles tend to be passive, well-behaved inmates, and that, if anything, Garcia himself would be the target of abuse while incarcerated. When asked if Garcia would be likely to abuse "a fresh faced 18 year old boy that looks like he's about 10" if such an inmate were placed in a cell with him, Dr. Powitzky said no, contending that Garcia's preferred victims were young girls. This was Garcia's case for mitigation.[8] Not a single family member or anyone else took the stand to plead for his life. As previously noted, several types of actual or alleged mitigating evidence are deducible from the trial record. Garcia focuses in this court on the argument that his pedophilia should be treated as mitigating, and in a footnote he "by no means concedes" that his history of childhood physical and sexual abuse, neglect and bizarre upbringing could adequately be considered by the jury under the Texas special issues. [9]

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[8] Absent from Garcia's case is any evidence of organic brain damage, mental retardation, or diminished mental capacity. Garcia's expert, Dr. Powitzky, admitted that he had found no evidence of organic brain disease, brain syndrome, mental illness or psychosis beyond "mild depression" and Garcia's "personality disorder," pedophilia. 21 RR 2875.

[9] Elsewhere, Garcia preserved claims that his substance abuse and good character during incarceration are mitigating. Case law concludes, however, that contrary to Garcia's view, these two types of evidence may be fully accounted for under the Texas sentencing scheme. *See Franklin v. Lynaugh*, 487 U.S. 164, 177-79, 108 S. Ct. 2320, 2329-30 (1988) (evidence of good character during incarceration encompassed by Texas sentencing scheme);

Although evidence that a defendant was a victim of childhood abuse may constitute mitigating evidence, it was not so used here. At trial and before this court, Garcia's child abuse evidence and argument have been entirely bound up in his contention that pedophilia should be treated as a "mitigating circumstance." We disagree, for two reasons. First, defense counsel neither presented evidence of Garcia's child abuse for its mitigating effect nor sought sympathy at trial based on Garcia's upbringing. Second, being a pedophile is inherently not mitigating of moral culpability. With respect to the alleged independent mitigating effect of Garcia's childhood sexual abuse, this court can only review the case that his counsel presented to the jury at trial, not the case as Garcia recharacterizes it nearly twenty years later. At trial, Garcia's own expert testified that he is an irremediable pedophile and, as such, a clear future danger in free society. Faced with that reality as well as Garcia's criminal record of pedophilia, the defense counsel sensibly urged the jury *not* to give Garcia sympathy because of his background:

> I ask for no sympathy for Fernando Garcia. Fernando lost all right to our sympathy when he went from being a victim to a predator. When Fernando crossed that line, I don't know. It's nowhere in the evidence. Two psychologists can't tell you, but he crossed that line. We unfortunately, as

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Brewer v. Dretke, __ F.3d __ , No. 04-70034, 2006 WL 477142 (5th Cir. Mar. 1, 2006) (evidence pertaining to substance abuse encompassed by Texas sentencing scheme); *Harris v. Cockrell*, 313 F.3d 238, 242 (5th Cir. 2002) (same), *cert. denied*, 540 U.S. 1218, 124 S. Ct. 1503 (2004).

> lawyers, cannot bring you evidence as to when that line was crossed.

These statements effectively tell the jury not to give any independent mitigating effect to evidence of Garcia's childhood abuse and neglect. The evidence of his background is presented to the jury only as an explanation for his adult pedophilia. Counsel essentially argued that Garcia's childhood abuse led to his pedophilia, which in turn precipitated his assault, rape, and murder of Veronica Rodriguez to such an extent that his act was not sufficiently "deliberate" to warrant the death penalty. The defense strategy was to focus on expert testimony that pedophiles do not act with the requisite deliberateness and pose no danger to prison society. While the Supreme Court has made clear that jurors must not be denied, by any acts of the State — in the death penalty laws or in their implementation through jury instructions — the ability to give effect to mitigating evidence, the Court's rulings do not affect a defendant's trial strategy. No question of constitutional error by the State is raised where, as here, Garcia's evidence of childhood abuse is taken on the terms in which his counsel offered it — as an explanation, but not in extenuation of his crimes. Contrary to the explanation offered by the dissent, the defense counsel's characterization of Garcia as a "predator" and specific request for "no sympathy" do not invite the jury to apportion moral responsibility to persons other than the defendant. Rather, with these statements, defense counsel did just what Garcia contends the special issues do — removed the abuse evidence from the scope of the jury's mitigation considerations. It may be argued that counsel's above-quoted statements are a mere "rhetorical flourish," part of a peroration culminating in his urging

the jury to spare Garcia's life as an act of justice,[10] not sympathy.10 As such, it would be contended, the statements should not constrain Garcia's argument to this court. We disagree. It is elemental to orderly legal procedure that an appellate court review the case as presented in the trial court. The record is clear, and the above-quoted references use Garcia's childhood problems only to explain his transformation into a "predator."[11] No doubt counsel chose not to seek mitigation from the evidence of Garcia's childhood because a jury would inevitably draw comparisons with what Garcia had inflicted on other children. As a result, we reject the contention, offered by the dissent, that the reason for the defense counsel's trial strategy was the constraint imposed by the Texas special issues. At the time the case was argued, Garcia had the benefit of a nullification instruction. Even though this type of instruction was

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[10] Garcia's counsel went on with this theme very briefly: We cannot bring you Fernando's father to tell you that my only fatherly act began at conception and ended at conception. We cannot bring you his mother whose only motherly love was ended at birth. What do we have? What is the sum total we can bring you about this man? We can bring you two pathetically short records from San Antonio, the sum total of Fernando's academic achievements. We can bring you some records from the Texas Department of Corrections. We can bring you medical records from Maine regarding a suicide attempt. We do not have the luxury of having any exhibits showing when Fernando was victimized. When did the neglect, the abuse, the indifference, the poverty and the hate turn Fernando Garcia from a victim to a predator? Only you can answer that in your verdict. 21 RR 2920-21.

[11] For that matter, Dr. Powitzky's testimony about Garcia's sexual abuse is (a) based solely on Garcia's history as related to the doctor and (b) the only evidence that Garcia was sexually abused as a child. There is no corroboration from family members or friends in the record.

later found to be unconstitutional, it still provided the defense counsel with a reason to argue mitigation beyond the special issues. The second error in Garcia's argument is the suggestion that pedophilia may be considered "mitigating" of a defendant's moral culpability. No case has so held. While it may be true that Garcia's condition arose in part from his abnormal childhood, and that the condition is both permanent and involuntary, pedophilia is unlike any other personal characteristic that courts have held to be potentially mitigating. Other personal characteristics, *e.g.*, mental illness, retardation, addiction, or certain personality disorders, may suggest that a defendant is himself arguably both a victim and not fully morally responsible for his actions. Such characteristics have no intrinsic negative component; they may limit a person's potential without necessarily causing harm to society. Pedophilia of the type exhibited by Garcia, however, is manifest only in his victimization of others for his personal, perverted gratification. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346, 375-77, 117 S. Ct. 2072, 2080, 2088-89 (1997)(Breyer, J., dissenting) (acknowledging pedophilia as a serious mental disorder or abnormality that can render a person dangerous to others). There is no sense in which reasonable people could view Garcia's pedophilia as morally mitigating of guilt, any more than reasonable people would find a defendant's uncontrollable compulsion to commit incest or eat human flesh "mitigating." Garcia's argument, in short, represents a novel and illogical extension of the Supreme Court's *Penry* cases, which we reject.[12]

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[12] We do not understand Judge Benavides to disagree with our conclusion that Garcia's pedophilia is not morally mitigating.

III. Conclusion

Our principal conclusions are that, on the record, Garcia cannot see mitigating treatment for his childhood abuse because he did not do so before the jury, and he cannot advocate that his pedophilia, as represented in his criminal record and expert testimony, was in any way mitigating.[13] His other forms of mitigating evidence were clearly cognizable by the jury in the context of the special punishment issues. We respectfully disagree with the dissent's position that any evidence of childhood abuse must be considered under *Penry* regardless of the context in which it was offered at trial. We are presented here with a situation in which the defense counsel's theory was that the evidence should be considered for its relevance under the deliberateness special issue and not for additional mitigating effect. On habeas review, the petitioner argues that the special issues limited the jury's ability to give mitigating effect to the evidence, but it was the defense counsel's theory that imposed the limits on the jury. Because the jury was able to give effect to the evidence as presented, there is no *Penry* violation. Our holding is a narrow one, specific to the facts of this case where defense counsel did not present the evidence for its mitigating effect and instead expressly asked the jury not

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[13] Based on these conclusions, the ultimate decision of the state court falls far short of meeting the "objectively unreasonable" requirement for the issuance of a writ of habeas corpus under 28 U.S.C. § 2254(d), regardless of whether the court's reasoning was at times incorrect. We therefore need not discuss the (likely) infirmity of the special "nullification" instruction given the jury or the State's contention that there is no reasonable likelihood, on this record, that the jury unconstitutionally applied the jury instructions. *See Boyde v. California*, 494 U.S. 370, 380, 110 S. Ct. 1190, 1197-98 (1990).

to sympathize with Garcia. Contrary to the dissent's somewhat hyperbolic suggestions, we do not hold that relevant mitigating evidence should be ignored, nor that a mitigation theory is even required. We do, however, believe we are required to review the case that was actually presented to the jury. We fail to understand how the dissent extrapolates from our holding that defense counsel must argue jury nullification in order to preserve *Penry* error. We also reject any comparisons to a procedural default claim since the issue is not whether or not Garcia has raised a *Penry* claim but whether or not the evidence was advanced for its mitigating effect.

In sum, the decisions of the state courts are not vulnerable under AEDPA's demanding tests. The judgment of the district court denying habeas relief is **AFFIRMED**.

BENAVIDES, Circuit Judge, dissenting:

I respectfully dissent from the majority's decision because it mischaracterizes the record and contravenes Supreme Court precedent. Fernando Garcia presented evidence at the sentencing phase of his capital trial that he suffered severe and frequent sexual abuse before the age of ten. Texas law, however, did not permit the jury to give proper effect to this mitigating evidence in deciding between life and death. The majority nonetheless concludes that no Eighth Amendment violation occurred.

It reasons that Garcia is now estopped from using the abuse evidence in mitigation because his trial lawyer did not explicitly demand that the jurors disregard Texas law and violate their oaths.

To put the majority's decision in perspective, I offer the following chronology: (1) Texas law did not allow the jury to consider abuse mitigation; (2) Garcia vigorously objected that this was unconstitutional under *Penry* and requested an additional special issue; (3) the trial judge rejected Garcia's objection on the record; (4) Garcia, having preserved his *Penry* objection, attempted (unsuccessfully) to mold his summation to comply with the judge's order and with Texas law; (5) Garcia maintained his *Penry* claim throughout direct and collateral review; (6) Garcia is now precluded from complaining under *Penry*. Before exploring the flaws in the majority's holding, I will explain why Garcia is entitled to relief under a proper *Penry* analysis.

1. The "Proper Legal Analysis" Under Penry

When considering *Penry* claims, "the proper legal analysis . . . is for the court to answer two questions: (1) whether the defendant's evidence held relevance to the

jury's capital deliberations; and if so, (2) whether, the jury was able to give constitutionally-sufficient mitigating effect to that evidence." *Tennard v. Dretke*, 442 F.3d 240, 257 (5th Cir. 2006) (*"Tennard III"*). If the Court answers "yes" on the first prong and "no" on the second, then Supreme Court precedent requires habeas relief. See id.

a. Garcia Presented Relevant Mitigating Evidence

The State correctly concedes, "There is no question as to the relevancy of Garcia's mitigating evidence." (Dretke Suppl. Br. 2.)[1] Dr. Powitzky testified that Garcia was repeatedly drugged by his mother at a young age so he would have sex with her and her boyfriend; forced to perform oral sex at the age of five on a friend of his brother's and at six on his brother; forced to perform oral sex at the age of eight on a fourteen-year-old female cousin; and sexually abused in the third grade by a nun who was supposed to be providing him with spiritual guidance. *Penry v. Lynaugh ("Penry I")* establishes that evidence of this kind properly mitigates. *See* 492 U.S. 302 (1989); *see also supra* p. 15 (Maj. Op.) ("[E]vidence that a defendant was a victim of childhood abuse may constitute mitigating evidence . . . ."). The Supreme Court's decision in Tennard clarified that general relevance is all that is required. *See Tennard v. Dretke*, 542 U.S. 274, 283–84 (2004) (*"Tennard II"*).

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[1] Although Garcia's history of abuse mitigates, I agree with themajority that Garcia's evidence that he suffered from a pedophilic personality disorder does not meet even the low threshold of relevance set by *Tennard II*. In my view, instances of pedophilic abuse that Garcia himself suffered as a victim mitigate independently from his alleged pedophilic personality disorder.

b. The Jury Could Not Give Sufficient Effect to Garcia's Mitigating Evidence of Child Abuse

i. The Texas Special Issues Were Inadequate

I now turn to the second prong of the *Tennard III* test. Supreme Court precedent conclusively refutes the State's position that Garcia's evidence of childhood abuse could be given constitutionally-sufficient mitigating effect under the deliberateness and future dangerousness special issues.[2] In *Penry* I, the Court held that the Texas special issues did not permit the jury to give proper mitigating effect to Penry's "abused background." 492 U.S. at 315. "[E]vidence of . . . childhood abuse has relevance to [a defendant's] moral culpability beyond the scope of the [Texas] special issues." *Id.* at 322. This is because "[p]ersonal culpability is not solely a function of a defendant's capacity to act 'deliberately.'" *Id.* A defendant who acts deliberately but who has suffered childhood abuse may be "less morally culpable than defendants who have no such excuse." *Id.* at 323 (internal quotation marks omitted). Additionally, a "history of abuse" has only aggravating effect as to the second

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[2] The majority incorrectly suggests that Garcia may not have fully asserted an argument in this Court based on his history of abuse. *See Supra* p. 15 (Maj. Op.) (stating that Garcia's abuse argument was limited to a footnote). On the contrary, Garcia made an argument based on his abuse in the main text of at least four different documents submitted to this Court. (Garcia Br. 6–7 & 29 (describing in detail Garcia's history of abuse and arguing that "evidence of . . . his childhood neglect and abuse fell outside the scope of the submitted punishment issues, and therefore required an adequate mechanism—one other than a nullification instruction—in order to permit each juror to give the evidence particularized consideration and effect")); (Garcia Reply Br. 14); (Garcia Suppl. Br. at 9–12); (Garcia Letter-Brief 3).

special issue, since "it indicates that there is a probability that he will be dangerous in the future." *Id.* at 324.[3]

Although Penry presented evidence of diminished mental capacity along with evidence of childhood abuse, the *Penry I* Court treated *Penry's* history of abuse as something with independent mitigating effect. See id. at 322. At no point in the opinion does the Court remark that it is only because Penry is mentally retarded that his past history of abuse was not given sufficient mitigating effect under the special issues. *See Hernandez v. Johnson*, 248 F.3d 344, 377 (5th Cir. 2001) (Dennis, J., dissenting) ("The [Supreme] Court did not hold or suggest that either the factor of mental retardation or childhood abuse by itself would fail to constitute relevant mitigating evidence that the jury must be able to consider and give effect to in deciding Penry's fate.").[4] In *Tennard II*, the High Court discussed Penry's mental retardation and history of abuse claims in wholly independent terms: "As to the evidence of childhood abuse, we held that the two special issues simply failed to provide a vehicle for the jury to give it mitigating effect." 542 U.S. at 279 (citing *Penry I*) (internal modifications and quotation marks omitted). In this case, as in *Penry I*, the special issues did not provide a meaningful vehicle for the jury to give effect to Garcia's mitigating evidence of child abuse.

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[3] Therefore, Garc : history-of-abuse evidence, just like *Penry's*, forced him to face the "two-edged sword" that worried the Supreme Court. *See Penry I*, 492 U.S. at 324.

[4] The majority in Hernandez held that, because the child abuse was "unlinked to the offense, it is not mitigating." 248 F.3d at 349. Since then, the Supreme Court has explicitly rejected this Circuit's nexus requirement. *See Tennard II*, 542 U.S. at 284.

ii. The "Nullification Instruction" Did Not Cure the Problem

The "nullification instruction" given in this case did not fix the problem. Texas courts adopted a nullification instruction in an attempt to correct the special issues' inadequacies identified by the Supreme Court in *Penry I*. Such an instruction permits the jurors to answer "no" to one of the special issues (even though the proper answer is "yes") if they still believe that the death penalty is not warranted. In *Penry v. Johnson* (*"Penry II"*), the Supreme Court found this innovation insufficient. *See* 532 U.S. 782 (2001).

Although the nullification instruction given in Garcia's case differed in some respects from the nullification instruction condemned by *Penry II*, Garcia's instruction still had a primary flaw identified by the Supreme Court: it required jurors to answer a special issue "dishonestly in order to give effect to . . . mitigating evidence." *Id.* at 802–03 (emphasis in original); (Dretke Br. 14 n.15 (conceding that the instruction was "substantially similar to the 'nullification instruction' at issue in *Penry II*").[5] Thus, under *Penry II*, the nullification instruction did not bring Garcia's mitigating

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[5] In this case, as in *Penry II*, the prosecution's closing argument compounded problems with the nullification instruction by emphasizing that the jurors had to answer the special issue questions honestly: "you told us [at voire dire] . . ., 'if you people bring the kind of evidence that convinces me the answer is yes, I'll answer the questions yes.' . . . You told us very clearly and very emphatically that, 'if you people right here bring the kind of case that convinces me that those questions should be answered yes, I'll answer those questions [the two special issues] yes.'" (R. at 23:2902–03.) Then later, "Did he do it deliberately? Yes he did. I'm going to ask you to answer that question yes because the evidence says that answer is yes." Id. at 2906.

evidence within the effective reach of the jury. [6]

In sum, Garcia's claim satisfies the second prong of the test that *Tennard III* derived from the Supreme Court's opinion in *Tennard II*. The jury was unable to give constitutionally sufficient mitigating effect to Garcia's evidence. This should be the end of the matter. This Court, following Supreme Court precedent, has identified the two questions that a proper *Penry* analysis entails. Both favor Garcia. The majority, however, denies relief through a novel theory. This theory was not argued by the State, [7] has no foundation in the decisions of this Court, and contravenes *Penry II* and *Tennard II*.

2. The Majority's Estoppel/Default/Nullification Rationale

The majority here holds that Garcia is somehow estopped from arguing that his mitigating evidence went beyond the special issues because his trial lawyer struggled to shoehorn that evidence within the special issues at summation. *See supra* p. 17 (Maj. Op.). It is worth noting that the majority's creative approach is the fourth separate rationale that has been offered to uphold Garcia's death sentence. The Supreme Court has rejected

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[6] Paradoxically, the majority simultaneously acknowledges that nullification instructions are "unconstitutional" yet denies relief in part because "Garcia had the benefit of a nullification instruction." *Supra* p. 19 (Maj. Op.).

[7] As discussed above, the State's primary argument on appeal was that Garcia's history-of-abuse evidence "could be fully considered within the special issues." (Dretke Suppl. Br. 2). The majority declines to consider that issue. *Supra* p. 16 (Maj. Op.).

the first three justifications. [8] The latest approach is to deny Garcia relief because his trial lawyer failed to argue the proper "mitigation theory" before the jury, *supra* p. 11, a "mitigation theory" that Texas law did not even allow the jury to consider at the time.

The majority's refusal to consider Garcia's "new arguments in federal court" because they do not reflect the "case [he] presented in the [state] trial court," *supra* 11, 18 (Maj. Op.), sounds a lot like procedural default. There is a reason why the majority merely gestures in that direction without ever fully going down the procedural-default path. It is because Garcia's lawyer clearly made a *Penry* objection in the Texas trial court. After the court submitted a proposed jury charge, Garcia objected as follows:

> In the Court's Charge on mitigation, which is page 2 of the Court's Charge, we would object for the following reasons:
>
> . . .

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[8] The State defended the sentence on the ground that evidence of child abuse is within the scope of the special issues. (Dretke Br. 36 (arguing that Garcia's jury could give effect to his evidence of sexual abuse through the "deliberately" special issue).) The Supreme Court rejected this rationale in *Penry I*. The Texas Court of Criminal Appeals affirmed Garcia's sentence on the ground that the nullification instruction cured any problem with the special issues. *See Garcia v. State*, 887 S.W.2d 846, 860 (Tex. Crim. App. 1994). The Supreme Court rejected this rationale in *Penry II*. The district court below applied then-controlling Fifth Circuit precedent and upheld Garcia's sentence on the ground that his mitigating evidence was not "constitutionally relevant." *Garcia v. Dretke*, 2003 WL 22144058, *4–5 (N.D. Tex 2003) (unpublished) (holding that Garcia's evidence of "sexual abuse he received as a child" did not give rise to a "uniquely severe permanent handicap"). The Supreme Court rejected this rationale in *Tennard II*.

> [W]e would submit, Your Honor, that drug and alcohol abuse and child abuse have been brought into evidence. They are universally considered to be mitigating factors. And that the Court does not set those out in applying the law to the facts and relating them to the relevant questions in either Special Issue No. 1 or Special IssueNo. 2.
>
> We would submit, Your Honor, that a fourth special issue is required. What I mean by a fourth special issue is an additional special issue besides Special Issues 1 and 2. We would, of course, concede that Special Issue3 is not raised by the evidence.[9]
>
> But the fourth special issue, that has been talked about in Penry, is mitigating evidence that is relevant to the blameworthiness and moral culpability of the Defendant in general, yet not directly relevant to either one of the first two special issues.

(R. at 21:2890–91 (emphasis added).) The trial court denied the objection "with some reluctance." Id. at 2895.

The majority could not rest its analysis on any established version of procedural default because Garcia

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[9] Under Texas law, a third special issue was sometimes submitted. "'[I]f raised by the evidence,'" the court would submit, "'whether the conduct of the defendant in killing the deceased was unreasonable in response to provocation, if any, by the deceased.'" *Tennard III*, 442 F.3d at 246 n.3 (quoting TEX. CRIM. PROC. CODE Ann. §37.071(b) (Vernon 1981)).

made a *Penry* objection and maintained it throughout direct and collateral review. *See Beard v. Greene*, 523 U.S. 371, 375 (1998) (defining the procedural default rule: "assertions of error in criminal proceedings must first be raised in state court in order to form the basis for relief in habeas").[10] Whether or not the majority's theory should be understood as a novel extension of procedural default doctrine, that theory is flawed for a number of reasons.

The majority reasons that Garcia should be estopped from making a *Penry* claim because his trial lawyer cabined his closing argument within the deliberateness special issue. The premise of this argument misstates the record. After the trial court denied his explicit *Penry* objection, Garcia's lawyer nonetheless did present the jury with a "mitigation theory" that went outside the scope of the special issues. He argued that "the abuse," among other things, "turn[ed] Fernando Garcia from a victim to a predator." Id. at 2921. The logic of this argument goes outside the deliberateness special issue. It invited the jury to shift some of the moral responsibility for the crime away from Garcia himself to Garcia's abusers, whose conduct was at least partly responsible for turning him into a predator. Under this "mitigation theory," the jury would attribute some of the blame to Garcia's abusers whether or not Garcia murdered his victim deliberately. Nor did counsel's vague rhetorical flourish ("I ask for no sympathy

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[10] Similarly, traditional principles of equitable estoppel do not bar Garcia from pressing his *Penry* claim. In a unanimous decision, the Supreme Court recently confirmed the limitations on that doctrine. Ordinarily, it only applies where a party has "succeeded in persuading a court to accept" a position that is "clearly inconsistent" with the one it now espouses. *See Zedner v. United States*, No. 05.5992, slip op. at 13–15, 547 U.S. __ (June 5, 2006). That has not happened here.

for Fernando Garcia") negate this argument. *Contra supra* p. 16–17 (Maj. Op.). The jury did not have to conjure feelings of sympathy for Garcia to acknowledge that others shared moral responsibility for the crime and to show Garcia mercy on that basis.

In its rebuttal, the State clearly did not think Garcia's "mitigation theory" had been entirely bound up with whether he acted deliberately. The State argued that Garcia's "abuse[] as a child" did not excuse his actions because he had the opportunity to participate in rehabilitative counseling but chose not to do so. *Id.* at 2927. The State essentially contended that Garcia's failure to seek rehabilitation broke the causal chain between Garcia's original abusers and his crime: "His decision, his moral decision, his moral culpability, his life. Nobody else's." *Id.* at 2928 (emphasis added). Under the State's theory, despite his history of abuse, Garcia became "solely responsible" for being a "rabid dog" when he "rejected every single attempt to ever make him better." *Id.* at 2934, 2930. In short, the State argued not only that Garcia acted deliberately but also that Garcia's attempt to shift some of the moral responsibility to his abusers should be rejected.

Thus, the arguments of the defense and prosecution presented the jury with a significant moral controversy. The Texas special issues, however, "provided an inadequate vehicle for the jury to make a reasoned moral response" to the dispute. *Penry II*, 532 U.S. at 800. They did not allow the jury to give effect either to the mitigating evidence Garcia introduced or to the "mitigation theory" he presented at summation.

Stepping back from the record in this case, dissecting a defense attorney's closing argument to determine whether it presented a "mitigation theory" that went outside the scope of the special issues is a

fundamentally misguided inquiry. To begin with, the search for "the case as presented in the trial court," *supra* p. 18 (Maj. Op.), cannot be limited to ten pages of closing argument in a three-thousand page trial transcript. Good advocates offer their theories of a case not just through summation but also through questioning of witnesses and through the very substance of the evidence they present. *See Taylor v. United States*, 495 U.S. 575, 601 (1990) (stating that courts might discern the Government's "theory or theories of the case presented to the jury" in "the indictment or other charging paper" or in the "actual proof at trial"). It makes no sense to ignore relevant mitigating evidence that the defendant presented to the jury simply because his counsel, at least according to the majority, failed to draw attention to it under an appropriate theory in closing argument. The defendant is not even required to present a summation. Under the majority's theory, however, a defendant's decision to forego summation would invariably forfeit his right to present a *Penry* claim in this Court "because he did not do so before the jury." *Supra* p. 20 (Maj. Op.).

More importantly, requiring the defendant to adopt a "mitigation theory" that goes outside the special issues is paradoxical. As applied, the special issues violate the Eighth Amendment precisely because they limited the defendant's possible mitigation theories. Under Texas law, Garcia could only argue either that he did not commit his crime deliberately or that he was not a danger to society. So that is what he did. The majority has simply confused the cause with the effect. Garcia's lawyer did not restrict the mitigation inquiry; rather, Texas's limited mitigation inquiry under the special issues restricted Garcia's lawyer.

This brings me to a problematic effect of the majority's logic. Texas law did not recognize the

mitigation theory the majority claims Garcia should have argued to the jury. Therefore, the majority's theory amounts to a requirement that counsel argue jury nullification at closing to preserve *Penry* error. *Compare United States v. Funches*, 135 F.3d 1405, 1409 (11th Cir. 1998) ("[D]efense counsel may not argue jury nullification during closing argument") and *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) ("We categorically reject the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent.").[11]

The majority's mandate that defense counsel argue nullification is impossible to square with *Penry II*. The Supreme Court held in *Penry II* that courts cannot require jury nullification of the special issues. The majority now requires that defense counsel insert the same "element of capriciousness" into the sentencing process that the *Penry II* Court found problematic. 532 U.S. at 800. The majority faults Garcia's lawyer for not specifically arguing to the jury that Garcia's life should be spared out of mercy even though doing so, as in *Penry II*, would have been tantamount to demanding that the jurors "answer the special issues dishonestly" and "violate their oath to render a true verdict." *Id.* at 802, 800 (internal quotation marks and emphasis omitted). By shifting the actor who introduces the nullification element from the judge to defense counsel, the majority basically makes an end run around *Penry II*.

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[11] It is not clear whether the majority acknowledges this problematic aspect of its reasoning: In one part of its opinion, the majority reasons explicitly that defense counsel should have made arguments "beyond the special issues" pursuant to the "nullification instruction" given in this case. *Supra* p. 19 (Maj. Op.). Later in its opinion, it denies that its reasoning requires that "defense counsel must argue jury nullification." *Id.* at 21.

In addition, the majority's approach is at odds with at least the spirit of *Tennard II*. In *Tennard II*, the Supreme Court rejected our constitutional relevance inquiry as creating an impermissible "threshold 'screening test'" with "no foundation in the decisions of this Court." 542 U.S. at 283–84. This rebuke overstated somewhat the novelty of our constitutional relevance test. *See Tennard III*, 442 F.3d at 253 n.16. Yet the critique certainly applies here to the majority's innovation. As with constitutional relevance, the majority uses its estoppel theory as a threshold screening test, refusing to"consider[] whether the jury instructions comported with the Eighth Amendment," *Tennard II*, 542 U.S. at 284, because defense counsel did not explicitly argue outside the special issues at summation. Moreover, the majority's approach has no foundation in Supreme Court precedent. The Court's jurisprudence has invariably looked to "the mitigating evidence presented" rather than to the closing arguments of counsel. *Tennard II*, 542 U.S. at 284 (discussing *Penry I*). Indeed, the majority cannot cite a single authority, Supreme Court or otherwise, in support of its estoppel theory during the eleven pages that it discusses that approach. *Supra* p. 11–19, 20–21 (Maj. Op.). Premises that are fundamental to the majority's analysis, such as that we must focus on the "mitigation theory Garcia actually made to the jury," *Id.* at 11 (emphasis in original), are left completely unsupported.

As previously stated, the Supreme Court has effectively told us that the only *Penry* inquiries we should undertake are (1) whether the petitioner presented relevant mitigating evidence and (2) whether the jury was able to consider and give sufficient effect to that evidence. Instead of following this mandate, the majority creates another threshold screen.

In conclusion, the trial court failed to present to the jury an adequate vehicle that could give meaningful mitigating effect to Garcia's history of child abuse. Supreme Court precedent establishes that this failure violated his Eight Amendment rights. I would hold that the state court's opposite conclusion was contrary to the Supreme Court's precedent or, alternatively, an unreasonable application of clearly established law. In accord with *Penry I*, *Penry II*, and *Tennard II*, I would reverse the district court's decision and remand with instructions to grant habeas relief. I respectfully dissent.

14 (5) 5-5-08

IN THE UNITED STATES SUPREME COURT

Cause No. 07-1052

NATHANIEL QUARTERMAN,

Director, Texas Department of Criminal Justice – Correctional Institutions Division,

Petitioner

v.

FERNANDO GARCIA,

Respondent

On Petition for Writ of Certiorari to the United States Supreme Court from the United States Fifth Circuit Court of Appeals

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BRIEF IN OPPOSITION

Respectfully Submitted by

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QUESTIONS PRESENTED / RESTATED BY RESPONDENT

(Capital case)

1. Whether this Court should address whether ***Penry*** error is subject to harmless-error analysis given that Petitioner waived the issue by not raising it until rehearing before the Court of Appeals, the issue involves a statue which was amended 17 years ago and affects a minuscule number of inmates, the type of error caused by the Texas statute was unique in capital sentencing, and the mitigating evidence that the jury was precluded from considering in this case – that the defendant was repeatedly subjected to sexual assault by family members during his childhood, leaves no doubt that the error was harmful under any standard?

2. Whether this Court should address whether ***Penry*** error is subject to harmless-error review given that the subjective and normative basis of the evidence underlying the jurors reasoned moral judgment in death penalty cases is incompatible with an evaluation of historical fact appropriate for harmless error review, and whether a finding of ***Penry*** error, by virtue of the nature of this evidence, subsumes the issue of harm?

PARTIES TO THE CASE

The parties to this case are Nathaniel Quarterman, Director of the Texas Department of Criminal Justice, Institutions Division, who is the petitioner, and Fernando Garcia, the respondent, who is an inmate in the Polunsky Unit of the Texas Department of Criminal Justice, Institutional Division.

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2 R. Hertz & J. Liebman, Fed. Habeas Corpus Pract. & Proc., (4th ed.2001). 15

Fernando Garcia, by and through his attorney Alexander Calhoun, files this Brief in Opposition to the Petition for Writ of Certiorari file by the State of Texas in this case and respectfully requests this Court to decline certiorari review to the United States Fifth Circuit Court of Appeals. The Court of Appeals' unpublished decision correctly applies this Court's ***Penry*** jurisprudence and presents no issue of compelling importance to nationwide capital jurisprudence. The State's Petition for Writ of Certiorari should be denied.

JURISDICTION

The Fifth Circuit issued a decision on panel rehearing in this case on October 15, 2007. ***Garcia v. Quarterman***, 03-11097 (5th Cir. 10-15-2007) (per curiam) (unpublished). This Court therefore possesses jurisdiction under 28 U.S.C. 1254(1).

PROCEDURAL STATEMENT

Mr. Garcia is among a diminishing number of Texas inmates who were convicted of capital murder and sentenced to death under the pre-1991 revisions to the Texas capital sentencing statute, Tex.Code Crim.Pro. Art. 37.071, which this Court found in ***Penry v. Lynaugh***, 492 U.S. 302 (1989), to be constitutionally problematic. He was convicted of capital murder and sentenced to death in Dallas County, Texas on December 9, 1989. His conviction and sentence were affirmed by the Texas Court of Criminal Appeals ("CCA") in a published decision. ***Garcia v. State***, 887 S.W.2d 846 (Tex.Cr.App. 1994). This Court denied his petition for writ of certiorari. ***Garcia v. Texas***, 115 S.Ct. 1317 (1995).

Mr. Garcia pursued state post-conviction relief, and was ultimately denied relief by the CCA on February 28, 2001. ***Ex parte Fernando Garcia***, No. 45,875-01 (Tex.Cr.App. Feb. 28, 2001) (per curium). He subsequently sought federal relief, but was denied by the United States District Court for the Northern District of Texas on October 6, 2003. The Court granted a certificate of appealability, however, on Mr. Garcia's ***Penry*** claim. ***Garcia v. Dretke***, 3:01-CV - 580 (N.D. Tex –Dallas, Oct. 6, 2003).

A panel of the United States Fifth Circuit Court of Appeals, with one dissent, initially denied relief on Mr. Garcia's ***Penry*** claim. ***Garcia v. Quarterman***, 456 F.3d 463 (5th Cir. 2006). In response to Mr. Garcia's petition for En Banc rehearing, however, the panel reversed itself, and granted relief on the ***Penry*** claim in an unpublished, per curiam decision. ***Garcia v. Quarterman***, 03-11097 (5th Cir. 10-15-2007).

Petitioner, the State of Texas, has sought a petition for writ of certiorari.

STATEMENT OF THE CASE

Mr. Garcia was convicted of murder in the course of the commission of aggravated assault. Tex. Penal Code Sec. 19.03(a)(2) (West 1987).

During the punishment phase of trial both the State and Mr. Garcia produced substantial evidence relating to Mr. Garcia's his background, character and circumstances. The State called Dr. Betty Lou Schroeder, a psychologist who had psychologically evaluated Mr. Garcia following his 1981 conviction for sexual abuse of a child.

Dr. Schroeder's records reflected that Mr. Garcia's mother abandoned him at birth and he had been raised by his 81-year old grandmother. The grandmother raised Mr. Garcia and his older brother; living on social security payments. [Vol. 21 RR: 2785].

Mr. Garcia advanced as far as the 10th grade in school before dropping out. [Vol. 21 RR: 2785]. His recorded academic performance reflected he was actually functioning at an elementary or middle school level. [Vol. 21 RR: 2796]. Dr. Schroeder believed that he had likely advanced through school as the result of social promotion. [Vol. 21 RR: 2798].

Mr. Garcia's drug history included the use of marijuana and spray paint. [Vol. 21 RR: 2785]. Dr. Schroeder described the effect of alcohol and spray paint abuse upon the abuser's health, explaining that spray paint in particular "primarily attacks the neurological system" "often" causing permanent damage. [Vol. 21 RR: 2800]. She observed that it was important to determine the extent to whether substance abuse contributed to Mr. Garcia acting upon his sexual drive. [Vol. 21 RR: 2801]. She also expressed her opinion, based upon Mr. Garcia's past recorded behavior while incarcerated, that Mr. Garcia would likely conform to a structured prison environment and would not present a future danger to prison society [Vol. 21 RR: 2806-2807].

Schroeder administered psychological tests to Mr. Garcia, including the Rorschach projective test to determine his perception of reality. Mr. Garcia's response indicated a "very pathological" outlook [Vol. 21 RR: 2789].

Dr. Schroeder believed that Mr. Garcia suffered from pedophilia, which she explained was a "personality disorder" consisting of "maladapted patterns of coping" a 'pathological way that seems to help the person deal with their problems." [Vol. 21 R: 2783, 2789 - 2790]. She explained that Mr. Garcia's "psychiatric/psychological pathology" related directly to a "basic primary human drive[ ] . . . sex" and for that reasons was "very difficult to change." [Vol. 21 RR: 2791]. She agreed with the prosecutor's suggestion that pedophiles were "extremely high risk" to commit similar offenses in the future, despite therapeutic intervention. [Vol. 21 RR. 2791]. She explained that individuals suffering from pedophilia tended to "grow more violent, more heinous as time goes on." [Vol. 21 RR: 2792].

On cross-examination, Dr. Schroeder agreed that Mr. Garcia had experienced a "psychologically deprived" background. [Vol. 21 RR: 2794]. He had had an abnormal childhood marked by the absence of both nurturing and discipline from his parents. [Vol. 21 RR. 2794 - 2995]. In describing Mr. Garcia's background, Schroeder explained that "often times individuals such as this have also been sexually abused as children, or had a great deal of abnormality in that area in their rearing." [Vol. 21 RR. 2794 - 2995].

Dr. Robert Powitzky, a clinical psychologist specializing in sexual abuse, testified on Mr. Garcia's behalf. [Vol. 21 RR: 2863]. Mr. Garcia's reported life history reflected that he had been abandoned by his mother at a very young age and raised by his elderly

grandmother. [21 Vol. RR: 2861]. He grew up on a rough part of San Antonio's west-side. [21 Vol. RR: 2863 - 2864]. In general, Mr. Garcia was neglected by his grandmother, but in the course of raising him, he was exposed to witchcraft and other "bizarre . . . experiences." [21 Vol. RR: 2861].

Dr. Powitzky, like Dr. Schroeder, diagnosed Mr. Garcia as suffering from pedophilia, which was defined as a "personality disorder." [Vol. 21 RR: 2861]. Mr. Garcia reported to Powitzky that had been sexually abused by both males and females from an early age. After she reappearing in Mr. Garcia's life, his mother began to sexually abuse him during periods of visitation. On occasion, Mr. Garcia would be forced to engage in sexual intercourse with his mother and her partners. He was oftentimes intoxicated during this abuse. At the age of five, Mr. Garcia was made to perform fellatio on the friend of an older brother, and at the age of six, he was forced to fellate his older brother. When he was eight years old, Mr. Garcia was sexually abused by a 14-year old cousin, being compelled by her to perform cunnilingus. When Mr. Garcia was in the third grade, he was sexually abused by a nun on several occasions. [Vol. 21 RR: 2861 - 2862].

According to Dr. Powitzky, Mr. Garcia's sexual abuse would have had a particular psychological impact upon his development because of cultural factors growing up in a Hispanic neighborhood in San Antonio. [Vol. 21 RR: 2863 - 2864]. Significantly, Mr. Garcia's childhood sexual abuse could likely have had a formative effect upon Mr.

Garcia's own development of pedophilia. [Vol. 21 RR: 2866]. Dr. Powitzky explained that sexual abuse often results in psychological trauma and resulting issues which are common to most people who have been sexually abused; these issues relate to questions of anger in the abuse victim, a sense of powerlessness, and questions about one's own sexual identity. [Vol. 21 RR: 2866 - 2867]. Dr. Powitzky believed that an individual experiencing "[t]he abandonment, the sexual abuse, the neglect that [Mr. Garcia] suffered . . . would [lead to] some sort of problems in living." [Vol. 21 RR: 2866].

Based upon his experience in treating pedophiles upon his review studies of pedophiles in structured environments, Dr. Powitzky believed that Mr. Garcia would likely not constitute a danger within prison. [Vol. 21 RR: 2870 - 2871]. Mr. Garcia primarily posed a problem of sexually abusing children when he was intoxicated -- substance abuse was clearly a precipitating factor to his behavior. [Vol. 21 RR: 2869, 2871].

Mr. Garcia also presented testimony by, Estella Rangel, who knew Mr. Garcia from the San Antonio housing project where they had lived. Rangel testified that on several occasions, she had observed Mr. Garcia smoking marijuana and sniffing aerosol paint. [Vol. 21 RR: 2852 -2854]. It was after these incidents of pain sniffing, that Mr. Garcia would sexually abuse his step-daughter, leading to his 1981 conviction for sexual abuse. [Vol. 21 RR: 2853].

Mr. Garcia admitted medical records from the Eastern Maine Medical Center in

Bangor, Maine, relating to a suicide attempt by Mr. Garcia on April 21, 1998. The notes and social reports report Mr. Garcia had attempted suicide as a result of depression. [Vol. 21 RR: 2888; XXIIIA].

During the charge conference, Mr. Garcia objected to the jury charge, requesting a "fourth special issue" on the ground that the evidence presented at trial fell outside the statutory punishment issues. [Vol. 23 RR: 2890 - 2891]. The trial court denied Mr. Garcia's request. [Vol. 23 RR: 2895]. The trial court submitted two statutory punishment issues pursuant to Tex.Code Crim.Pro. Art. 37.071(b)(1) & (2) as well as a "nullification instruction." [Clerk's Record ("CR"). 199 - 201; Vol. 21 R: 2898]

During closing argument, the prosecutor urged the jurors to "follow the law" by answering the special punishment issues consistent with their view of the evidence as fit within the punishment issues:

> [Y]ou told us you that you would follow that law. And third, you told us -- and, in essence, you told Ms. Little, you told Mr. Beach, and you told myself that, if you people bring the kind of evidence that convinces me the answer is yes, I'll answer the questions yes. Folks, let me tell you something, whenever you told us that, if you had answered very faintly or if you hesitated in that answer in any way, it was my job to make sure that you did not make one of the 12 jurors in this case. You told us very clearly and very emphatically that, if you people right here bring the kind of case that convinces me that those questions should be answered yes, I'll answer those questions yes.

[Vol. 21 RR: 2902 - 2903].

And throughout the prosecutor's closing argument, he argued that the evidence

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presented at trial compelled an affirmative answer on both punishment issues. [Vol. 21 RR: 2903 - 2912].

Mr. Garcia's defense counsel, constrained by the special issues argued to the jury the relevance of Mr. Garcia's mitigation evidence largely within the confines of the special issues themselves, attempting to convince the jury that Mr. Garcia would not pose a future danger because he would be incarcerated, and that he had not acted deliberately. [Vol. 21 RR: 2916 - 2917]. Counsel conceded that the jurors were obligated by their oaths to answer *honestly* the questions posed by the special issues according to the evidence presented. [Vol. 21 RR: 2914]. But despite these limitations, counsel nonetheless attempted to convey the fact that Mr. Garcia's background bore some mitigating relevance apart from the mere questions posed by the special issues:

> We value live. We value all human life. You people especially value life. . . If Fernando Garcia collapsed with a heart attack at this instant, you would not stand up and gloat. You would not say "Die, Fernando, die, die"
>
> * * *
>
> I ask no sympathy for Fernando Garcia. Fernando lost all right to our sympathy when he went from being a victim to a predator. When Fernando crossed that line, I do not know. It's nowhere in the evidence. Two psychologists can't tell you, but he crossed that line. We unfortunately, as lawyers, cannot bring you evidence as to when that line was crossed.
>
> We cannot bring you Fernando's father to tell you that my only fatherly act began at conception and ended at conception. We cannot bring you his mother whose only motherly love ended at birth.

> What do we have ? What is the sum total we can bring you about this man? . . . We do not have the luxury of having any exhibits showing when Fernando was victimized. What did the neglect, the abuse, the indifference, the poverty and the hate turn Fernando Garcia from a victim to a predator? Only you can use that in guiding your verdict and your answers to the special issues.

[Vol. 21 RR: 2915, 2920 - 2921].

Limited, as it was by the special punishment issues, and confronted with the trial court's *ad hoc* nullification instruction, the jurors returned affirmative responses to the deliberateness and future dangerousness punishment issues, resulting in the trial court imposing a sentence of death. [Vol. 21 RR: 2936 - 2937].

REASONS TO DENY THE PETITION FOR WRIT OF CERTIORARI

When the ink was barely dry on this Court's decision in ***Penry v. Lynaugh***, Mr. Garcia requested, but was denied, a specific instruction permitting the jurors in his trial to consider his mitigation evidence apart from its relevance to the special issues – "deliberateness" and "future dangerousness." Today, after nineteen years and nine *Penry*[1] decisions, the State of Texas finally concedes that the instructions in Mr. Garcia's punishment charge did indeed violate the Eighth Amendment. *Petitioner's Brief*, p.32. However, the State now contends that despite the absence of an adequate vehicle to give full effect to Mr. Garcia's evidence of extensive childhood sexual abuse, of his abandonment by

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[1] These are: ***Penry v. Lynaugh***, 492 U.S. 302 (1989); ***Graham v. Collins***, 506 U.S. 461 (1993); ***Johnston v. Texas***, 509 U.S. 350 (1993); ***Penry v. Johnston***, 532 U.S. 782 (2001); ***Tennard v. Dretke***, 542 U.S. 274 (2004); ***Smith v. Texas (Smith I)***, 543 U.S. 37 (2004); ***Abdul-Kabir v. Quarterman***, 550 U.S. ___, No. 05-11284 (4/24/2007); *and*, ***Brewer v. Quarterman***, 550 U.S. ___, No. 05-11287 (4/24/2007); ***Smith v. Texas (Smith II)***, 550 U.S. ___, No. 05-11304 (4/25/2007).

his parents, of the emotional neglect he experienced from his elderly caretaker, of his impoverishment, of the severe psychological disorder arising from his own childhood sexual victimization, of his chronic drug and alcohol dependency, and his intoxication at the time of the offense, of his depression and suicide attempt, all this evidence is subject to a harmless error analysis under ***Brecht v. Abrahamson***, 507 U.S. 619 (1993), and asks this Court to adopt this new spin to its ***Penry*** jurisprudence. *See, Petitioner's Brief*, p. 23. For the reasons below, Mr. Garcia would contend that certiorari is unwarranted and should be denied.

I. THIS COURT HAS PREVIOUSLY DENIED A PETITION FOR WRIT OF CERTIORARI ON THIS SAME GROUND IN ***NELSON V. QUARTERMAN***, NO. 06-1254 (2007), BUT PETITIONER HAS PRESENTED NO NEW BASIS TO ADDRESS CLAIM.

Through seeking a writ of certiorari on Mr. Garcia's unpublished panel opinion, Petitioner is essentially asking this Court to re-consider its denial of certiorari nine months ago on the Fifth Circuit Court of Appeals' En Banc decision in ***Nelson v. Quarterman***, 472 F.3d 287 (5th Cir. 2006). *See*, ***Nelson v. Quarterman***, 551 U.S. ___, 06-1254 (June 18, 2007) (Order denying certiorari).

In ***Nelson***, the En Banc Fifth Circuit granted rehearing on its earlier panel decision following this Court's certiorari grants in ***Abdul-Kabir v. Quarterman***, 550 U.S. ___, No. 05-11284 (4/24/2007), *and*, ***Brewer v. Quarterman***, 550 U.S. ___, No. 05-11287 (4/24/2007), and reversing its earlier denial of relief based on the Circuit's own application of ***Penry*** jurisprudence, acknowledged that this Court's ***Penry*** jurisprudence requires jurors

be able to give *full* consideration and effect to the mitigation evidence presented at trial. ***Nelson***, 472 F.3d at 316. Concluding that the panel decision had violated this Court's ***Penry*** jurisprudence, the *En Banc* Court remanded the case for a new punishment trial. The Court did so without conducting a separate harm analysis, expressly rejecting the harmless-error standard from ***Brecht v. Abrahamson*** to ***Penry*** error. ***Nelson***, 472 F.3d at 314 - 315.

The State of Texas subsequently sought a petition for writ of certiorari challenging, *inter alia*, the Fifth Circuit's rejection of a harmless error standard under ***Penry***. *See*, ***Quarterman v. Nelson***, No. 06-1254, Petition for Writ of Certiorari, pp. 27 - 30. The State's challenge to ***Nelson*** was pending at the same time this Court was deciding ***Abdul-Kabir*** and ***Brewer***, and the Court was clearly cognizant of ***Nelson*** and its import in the context of ***Abdul-Kabir*** and ***Brewer***. During oral argument, counsel for Abdul-Kabir and Brewer proposed vacating those cases in light of ***Nelson*** and members of this Court noted the State's assurances that it would seek certiorari in ***Nelson***. *See*, ***Abdul-Kabir v. Quarterman***, No. 05-11284, and ***Brewer v. Quarterman***, 05-11287: Transcript of Oral Argument, at 5, 7 (January 17, 2007). Certainly, this Court would not have mistaken the topicality of ***Nelson***'s harmless error ruling during the Court's own consideration of ***Abdul-Kabir*** and ***Brewer***, and file filing of a certiorari petition concurrent with these latter two cases provided this Court a prime opportunity to conclusively resolve this issue, had the Court concluded that the issue had any lingering import to the Court's ***Penry*** jurisprudence. Nevertheless, two months after this Court's decisions in ***Abdul-Kabir*** and ***Brewer*** it denied

certiorari in ***Nelson***. *See*, ***Nelson v. Quarterman***, 551 U.S. ___, 06-1254 (June 18, 2007)(Order denying certiorari). There were no dissents within this Court to the denial of certiorari, despite ***Nelson***'s governing rule – complete with the rejection of a separate harm analysis – to the Fifth Circuit's application of ***Penry***.

Petitioner now seeks to raise this same issue which this Court so recently determined to be unworthy of certiorari. But there is nothing about Mr. Garcia's case – an unpublished, *per curiam* decision – which would merit a grant of certiorari. Because it is unpublished, the precedential value of Mr. Garcia's case is marginal under the Fifth Circuit's local rules. *See*, Fed.R.App.Pro. Local Rule 47.5.4 ("Unpublished opinions issued on or after January 1, 1996 are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case .... An unpublished opinion may, however, be persuasive."). Even assuming arguendo that the panel's resolution of Mr. Garcia's ***Penry*** claim without a ***Brecht*** harmless error analysis was erroneous, the decision has neither nationwide or even circuit-wide importance; it is not binding upon the Fifth Circuit as a whole, nor even upon other Fifth Circuit panels or lower courts. The decision in Mr. Garcia's applies to no one other than Mr. Garcia himself.

Petitioner has provided no compelling basis for this Court to revisit its recent denial of certiorari on this issue. Petitioner cites no intervening decisions by this Court which question the Fifth Circuit's holding in ***Nelson***. Indeed, Petitioner raises fundamentally the same argument in this case as it did in ***Nelson***. *See and compare*, ***Quarterman v. Nelson***,

No. 06-1254 Petition for Writ of Certiorari, pp. 27 - 30, with ***Quarterman v. Garcia***, No.07-1052, Petition for Writ of Certiorari, pp. 23 - 30. Petitioner has cited no specific portion of this Court's ***Penry*** jurisprudence indicating that a separate harm analysis is required, or even appropriate under ***Penry***.[2] To be sure, the ***Penry II*** decision suggests precisely the opposite, that a separate harm analysis is not appropriate upon a finding of ***Penry*** error. In ***Penry II***, while reversing John Paul Penry's death sentence a second time for ***Penry*** error, this Court also addressed a separate ***Estelle v. Smith***, 451 U.S. 454 (1981) error in the petition, but concluded the error was harmless under ***Brecht***. ***Penry II***, 532 U.S. at 796. This Court's contrast in treatment of these to errors is telling in the present case. Petitioner neither acknowledges ***Penry II***, nor presents any recent ***Penry*** jurisprudence indicating that ***Penry II*** is inconsistent with this Court's previous or subsequent ***Penry*** decisions. ***Penry II*** was not lost on the Fifth Circuit, however; in ***Nelson*** the Fifth Circuit expressly cited to this Court's ***Penry II*** decision as partial confirmation of its rejection of a separate harm analysis for ***Penry*** error. ***Nelson***, 472 F.3d at 314.

In addition to the lack of merit to Petitioner's grounds for certiorari, this Court is presented with an equally weighty procedural impediment to granting certiorari: Petitioner's

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[2] Petitioner suggests that this Court's decision in ***Hitchcock v. Dugger***, 481 U.S. 393 (1987), and summary remand in ***Signletary v. Smith***, 507 U.S. 1048 (1993), suggests that ***Penry*** error *can* be subject to harmless error. *Petitioner's Brief*, at 28. Petitioner reads more into these cases, however, than the cases provide. In ***Hitchcock***, this Court noted that the State had never made any attempt to argue harmless error, and therefore did not address the issue. ***Id.***, at 399. The Court's resolution of ***Hitchcock***, and its GVR in ***Smith*** does not establish the proposition on which Petitioner seeks to rely.

11th hour presentation of the harmless error defense before the Court of Appeals. Despite extensive litigation of Mr. Garcia's ***Penry*** claim in state and federal court, both on direct appeal from his conviction and in post-conviction proceedings, Petitioner failed to raise a harmless error argument until it raised the defense in a Supplemental Brief before the Court of Appeals on rehearing, 13 years into the litigation in this case. *See*, ***Garcia v. Quarterman***, 03-1109, Supplemental Brief of Respondent, p. 7 - 13. And even at this point, Petitioner's briefing on the issue was cursory, and devoid of any discussion of the specific evidence presented in this case. As such, it provided the court of appeals no basis to determine how the denial of a proper vehicle to consider Mr. Garcia's mitigation might have been harmless. It was certainly not incumbent for the Court of Appeals in this case to determine without Petitioner's guidance why the jurors' preclusion from giving effect to Mr. Garcia's mitigation evidence might have been harmless. *See*, ***United States v. Vega Molina***, 407 F.3d 511, 524 (1st Cir. 2005) (Court declined to consider harmlessness of error in light of Government failure to brief issue, commenting "we choose not to do the government's homework.").

This Court has been critical of litigants withholding a defense until late in the proceedings. ***Granberry v. Greer***, 481 U.S. 129, 132 (1987) ("We have also expressed our reluctance to adopt rules that allow a party to withhold raising a defense until after the "main event" in this case, the proceeding in the District Court — is over."). The federal courts have routinely held that the harmless error defense is subject to waiver if not timely and

properly presented. *See*, ***United States v. Cacioppo***, 460 F.3d 1012, 1025 - 1026 (8th Cir. 2006) ("the Government did not argue that the alleged instructional error was harmless, and the failure to do so waives any right to such review"); ***Sanders v. Cotton***, 398 F.3d 572, 582 (7th Cir. 2005) ("The Respondent also argues that any error in the jury instructions was harmless . . . . However, the Respondent did not make this argument in the district court, so it is waived."); ***Lam v. Kelchner***, 304 F.3d 256, 269 (3d Cir.2002) ("The first flaw in the Commonwealth's harmless error argument is that it was never raised before the District Court and was therefore waived."); *and*, ***Nelson***, 473 F.3d at 316 - 317 (Dennis, J., concurring op) (" I am now convinced that the state waived any argument concerning harmless error by failing to raise it in the district court."). *See also*, 2 R. Hertz & J. Liebman, Fed. Habeas Corpus Pract. & Proc., § 31.2, at 1373 - 1374 & n. 1 (4th ed.2001) ("Like other habeas corpus relief, the "harmless error" obstacle does not arise until the state asserts it; the state's failure to do so in a timely and unequivocal fashion waives the defense. Indeed, the "harmless error rule is particularly susceptible to the types of abuse that have led the Supreme Court to call for strict application of waiver rules to the state in habeas corpus proceedings."). Petitioner's delay in raising its harmless error defense until rehearing places Mr. Garcia's case in the same procedural posture as that in ***Nelson***, 473 F.3d at 314, 316 - 317. As such, Petitioner waived any harmless error defense for further review by raising it too late in the proceedings. This Court should not excuse Petitioner's thirteen year delay in raising its defense until the twilight of this litigation.

II. THE ISSUE BEFORE THIS COURT LACKS THE WIDESPREAD IMPORTANCE UNDERLYING THIS COURT'S DECISION TO GRANT A WRIT OF CERTIORARI DUE TO THE UNIQUENESS OF THE TEXAS DEATH PENALTY STATUTE AND LIMITED NUMBER OF TEXAS INMATES SUBJECT TO THE STATUTE.

Certainly, in this Court's decision whether to allocate its scare judicial resources to a writ of certiorari, the widespread applicability of the Court's ruling is of paramount concern. In the present case, the Court is being called to address an issue of rapidly dwindling importance since the issue focuses primarily upon the *sui generis* Texas death penalty statute, Tex.Code Crim.Pro. Art. 37.071. This statute is unlike any other State's death penalty statute, save one,[1] and therefore, the issue at hand would not, as a general matter, affect death penalty jurisprudence outside of Texas itself.

The impact of this Court's decision will be further limited within Texas, however, as a result of the Texas Legislature's amendment to the statue under which Mr. Garcia's death sentence was assessed. In 1991, in response to this Court's ***Penry*** decision, the Texas Legislature amended Art. 37.071 to include the type of instruction mandated by ***Penry***. In contrast to the inmates sentenced under the pre-amended statute, Art .37.071, Sec. 2(c), provides for a distinct special punishment issue directing jurors to consider all mitigation

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[1] Oregon's death penalty statute, Or. Rev.Stat. 163.150, is worded similarly to Texas's death penalty statute, but in contrast to the State of Texas, Oregon courts recognized early-on after ***Penry I*** the necessity of providing a broadly worded mitigation instruction. *See*, ***State v. Tucker***, 315 Or. 321, 332, 845 P.2d 904 (1993); ***State v. Wagner***, 309 Or 5, 786 P2d 93 (1990). In fact, each Oregon death sentence imposed prior to 1991 was reversed on the basis of this Court's ***Penry*** decision. *See*, William r. Long, "A Tortured Mini-history: The Oregon Supreme Court's Death Penalty Jurisprudence in the 1990's 39 Williamette L. Rev. 1, 5 (2003). Oregon's early and consistent recognition of the breadth of ***Penry*** removes Oregon's death penalty jurisprudence from the Court's concerns in whether a grant of certiorari will have widespread application outside of Texas.

evidence independent from the other (aggravating) punishment issue. *See*, Tex.Leg. Acts 1991, ch. 838, § 1, p. 2899, eff. Sept. 1, 1991. Due to the 17-year passage of time since the statutory amendment, a decision by this Court would have limited applicability to pre 1991 death sentenced Texas inmates simply due to attrition. During oral argument before this Court in ***Abdul-Kabir*** and ***Brewer***, the State of Texas advised the Court that there are only an estimated 47 inmates remaining on Texas' death row who were tried under the pre-1991 statute. *See*, ***Abdul-Kabir v. Quarterman***, No. 05-11284, and ***Brewer v. Quarterman***, 05-11287: Transcript of Oral Argument, at 43 (January 17, 2007). Of this number, only 25 cases appear to be in active litigation in state or federal court, another nine having completed federal proceedings by the time of oral argument. ***Ibid***. It is unclear among these remaining 25 active cases which ones would even merit ***Penry*** relief. To put this small number in context, as of the filing of this brief in opposition, there are 369 inmates on Texas' death row. *See*, http://www.tdcj .state.tx.us /stat/ offendersondrow.htm. Clearly, the total number of Texas inmates who could possibly be affected by any decision of this Court is quite small.[4]

Simply stated, this Court's decision to grant certiorari in this case would apply only

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[4] Even among this small group, there is unlikely to be a flurry of new litigation among the current inmates tried under the pre-1991 statute whose cases are complete. The Texas Court of Criminal appeals has concluded that Texas' statutory "abuse of the writ" doctrine will sometimes bar litigation of ***Penry*** claims not previously raised. *See*, ***Ex parte Hood***, 211 S.W.3d 767 (Tex.Cr.App. 2007). The Fifth Circuit has similarly concluded that inmates sentenced under the pre-1991 statute who did not present the issue in an earlier federal proceedings are precluded from doing so in a successive writ proceeding. ***In re Kunkle***, 398 F.3d 683, 684 -685 (5th Cir. 2005). Thus, the potential group of petitioners affected by a decision would be quite small, indeed.

to a few dozen inmates at most, who were tried under a statute amended nearly two decades ago. A decision on this case would have no nationwide impact, and little state-wide impact.

III. A HARMLESS ERROR STANDARD IS INAPPROPRIATE IN THE CONTEXT OF *PENRY* ERROR BECAUSE THE UNIQUE PREJUDICE FROM THE DEPRIVATION OF AN ADEQUATE VEHICLE TO CONSIDER MITIGATING EVIDENCE IS IMPOSSIBLE TO QUANTITATIVELY EVALUATE IN LIGHT OF THE JURORS' OBLIGATIONS TO UNDERTAKE A REASONED MORAL RESPONSE.

Although Petitioner contends ***Penry*** error is simply "garden variety trial error" subject to a harmless error analysis under ***Brecht***, *Petitioner's Brief*, p. 26, Petitioner misperceives the nature of ***Penry*** error. The nature of error appropriate for a ***Brecht***'s harm analysis are those types of errors which may be quantitatively assessed, ***Arizona v. Fulminante***, 499 U.S. 279, 307 - 308 (1991), and there are several types of error which, due to their nature of lending themselves to an objective assessment of historical fact, are amenable to a harmless error review. The effect of the admission of an illegally obtained confession, for example, ***Fulminante***, or even the effect of an erroneous jury charge on the burden of proof for a statutory *presumption*, ***Rose v. Clark***, 478 U.S. 570 (1986), are all questions of fact which may be analyzed in context of the other evidence presented at trial to determine the *probable* effect upon the jurors' decision-making process. But certain errors, even ones relating to how jurors could have considered evidence adduced at trail, cannot be quantitatively measured, *see*, e.g., ***Sullivan v. Louisiana***, 508 U.S. 275 (1993) (erroneous instruction on reasonable doubt); ***and***, ***Beck v. Alabama***, 447 U.S. 625, 642 (1980) (denial of instruction on lesser-included offense). Errors which are not subject to quantitative measurement are

immune from a harm analysis. *See*, ***United States v. Gonzalez-Lopez***, 548 U.S. 163 (2006) (explaining that errors deemed "structural" and not subject to harm analysis are those which are ""are necessarily unquantifiable and indeterminate.").

The nature of ***Penry*** error is broader than the "garden variety trial error" which Petitioner contends it to be. *Petitioner's Brief*, p. 26. The jury's preclusion of giving full effect to the Mr. Garcia's mitigation evidence – in contrast to questions of historical fact – defies a quantitative analysis of the evidence precisely because the jurors' role in ***Penry*** to make an amorphous moral judgment call. The ***Nelson*** Court correctly concluded as much in its rejection of a ***Brecht*** analysis, explaining that jurors evaluation in ***Penry*** is particularly unsuitable to a quantitative measure by an appellate court:

> This reasoned moral judgment that a jury must make in determining whether death is the appropriate sentence differs from those fact-bound judgments made in response to the special issues. It also differs from those at issue in cases involving defective jury instructions in which the Court has found harmless-error review to be appropriate. . . . . Given that the entire premise of the Penry line of cases rests on the possibility that the jury's reasoned moral response might have been different from its answers to the special issues had it been able to fully consider and give effect to the defendant's mitigating evidence, it would be wholly inappropriate for an appellate court, in effect, to substitute its own moral judgment for the jury's in these cases.
>
> Therefore, given the Supreme Court's refusal to allow an appellate court to substitute its own moral judgment for a moral judgment that the jury was unable to make in a Penry case, we decline to do so now.

Nelson, 274 F.3d at 315 (emphasis added)(citations omitted).

In a concurring decision, Judge Dennis, who had previously approved of a separate harm analysis under ***Brecht*** in his concurring panel decision, reversed himself and

specifically rejected his prior reasoning, explaining that ***Penry*** error it is not subject to quantitative assessment in the context of the evidence presented at trial: "a *Penry I* violation is not a 'trial error' because it is impossible for a reviewing court to 'quantitatively' assess what affect the mitigating evidence would have had on the sentencing jury if it had not been granted the discretion to choose between a life or a death sentence . . ."). ***Nelson***, 472 F.3d at 335 - 336.

While vigorously disagreeing with the En Banc Court's ***Penry*** analysis, and despite the specific discussion of the inappropriateness of harmless error standard by both the majority and concurrence, none of the dissenters disagreed with the Court's conclusion that a harmless error analysis was appropriate to ***Penry*** error. *See*, ***Nelson***, 472 F.3d at 337 - 348 (Dissenting Op.of Jones, C.J, joined by Jolly, Smith, Barksdale, Garza and Clement); ***id.***, at 348 - 351 (Dissenting op. of Smith, J.); ***id.***, at 351 - 353 (Dissenting op. of Clement, joined by Jones, Jolly, Smith, Barksdale and Garza); *and*, ***id.***, at 353 - 362 (Dissenting op. of Owen, Jolly and Smith).

And as this Court recently reiterated, a quantitative assessment of the mitigating value of a defendant's mitigation evidence and how it might have persuaded a jury is incompatible with a ***Penry*** analysis. *See*, ***Brewer***, 550 U.S. at ___, slip op. at 7 ("Nowhere in our Penry line of cases have we suggested that the question whether mitigating evidence could have been adequately considered by the jury is a matter purely of quantity, degree, or immutability."); *and*, ***Abdul-Kabir***, 550 U.S. at ___, slip op. at 24 (rejecting lower court's

conclusion that ***Penry*** violation did not occur because "even though Cole's mitigating evidence may not have been as persuasive as Penry's, it was relevant to the question of Cole's moral culpability for precisely the same reason as Penry's.").

Even a cursory review or Mr. Garcia's mitigation evidence demonstrates its lack of susceptibility to a quantitative evaluation of how jurors, had they been permitted to give effect to Mr. Garcia's mitigating evidence, might have done so. Mr. Garcia's history of repeated sexual victimization as a child, his resulting psychological disorder, his parental abandonment and childhood poverty, the emotional neglect experienced as a child, his prolonged substance abuse, even his depression and suicide attempt – all defy quantification since the evidence in question is not merely one of historical fact and how it fits in relation to other evidence presented at trial. Rather, such evidence goes to the core of the jurors inherently subjective, value-driven decision making in the context of an individualized sentencing decision: whether each juror finds such evidence to be mitigating, and if so, whether such evidence is sufficient, if mitigating, is sufficiently so to merit a life sentence despite the jurors' findings on the aggravating evidence. *See*, ***Cordova v. State***, 733 S.W.2d 175, 189 (Tex.Cr.App. 1987) ("The amount of weight that the fact-finder might give any particular piece of mitigating evidence is left to "the range of judgment and discretion" exercised by each juror. . . . Under our capital punishment scheme and procedures, mitigation is given effect by whatever influence it might have on a juror in his deciding the answers to the special issues.") (*quoting* ***Adams v. Texas***, 448 U.S. 38, 46 (1980)); *and*, ***McFarland v.***

State, 928 S.W.2d 482, 498 (Tex.Cr.App. 1996) ("Because the weighing of "mitigating evidence" is a subjective determination undertaken by each individual juror, we decline to review that evidence for "sufficiency." We defer to the jury's conclusion that the evidence did not warrant a sentence of life imprisonment."). Unlike other errors which relate to questions of fact, given the truly unique and subjective nature of the jurors' evaluation of mitigation evidence in the context of Texas' death penalty statute, any attempt by an appellate court to determine how the individual jurors might have been affected by the evidence is purely speculative. *See and cf.*, ***Sullivan***, 508 U.S. at 281 ("A reviewing court can only engage in pure speculation --- its view of what a reasonable jury would have done. And when it does that, "the wrong entity judge[s] the defendant['s moral culpability]." (citation omitted)). Any harm evaluation in the context of ***Penry*** error would necessarily require second-guessing by the appellate court, substituting its own opinion for that of the jurors who were deprived of the opportunity to pass their own moral judgment upon the evidence.

IV THIS COURT'S MOST RECENT *PENRY* DECISION IN *SMITH V. TEXAS* (*SMITH II*) SUGGESTS THAT THE QUESTION OF HARM FROM *PENRY* ERROR IS SUBSUMED INTO THE QUESTION OF ERROR.

The question raised by Petitioner appears to have already been decided by this Court in ***Smith II***, a contention made by the State of Texas in its certiorari petition in ***Nelson***. *See*, ***Quarterman v. Nelson***, No. 06-1254 Petition for Writ of Certiorari, p. 30 ("the applicability of the harmless-error review is *directly at issue* in *Smith v. Texas*, No. 05-11304

and is currently pending before the Court.") (emphasis added). Mr. Garcia would suggest that ***Smith II*** addresses Petitioner's contentions in this matter, concluding that the question of harm from ***Penry*** is subsumed into the question of error in itself.

Smith II addressed the CCA's decision on remand following this Court's reversal for ***Penry*** error in ***Smith I***. *See*, ***Smith I***, 543 U.S. at 48 - 49 (holding nullification instruction did not cure underlying ***Penry*** error). On remand, the CCA subjected Smith's claim to the state harmless error standard for jury charge error set out by Tex.Code Crim.Pro. Art. 36.19.[5] Construing this Court's ***Penry I*** and ***II*** decisions to address distinct errors, the CCA concluded that Smith had not properly preserved his objection to the punishment charge, and subjected his claim to the more stringent harm analysis under the state harm standard. ***Ex parte Smith***, 185 S.W.3d 455, 463 - 464, 467 (Tex.Cr.App. 2006). The CCA concluded that Smith had not been prejudiced because he had not demonstrated "'actual harm' much less 'egregious harm'" from the ***Penry*** error. ***Smith***, 185 S.W.3d at 468 - 472.

This Court granted certiorari this time to address the CCA's applied harm standard. This Court rejected the CCA's "egregious harm" standard to the constitutional question

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[5] As explained in ***Almanza v. State***, 686 S.W.2d 157 (Tex.Cr.App. 1984), jury charge error is reviewed for harm under two categories: the "some" harm standard, which applies to preserved error, and the "egregious harm" standard, which applies to "waived" charge error. ***Id.***, at 171. The CCA has explained that following a timely objection, reversal is required "if the error is 'calculated to injure the rights of defendant' which means no more than that there must be some harm to the accused from the error." ***Ibid.*** If not objection was made, reversal will not be made unless it was "egregious" and created such harm that he "has not had a fair and impartial trial" ***Ibid.***

In ***Arline v. State***, 721 S.W.2d 348 (Tex.Cr.App. 1986), the Court explained that "the presence of any harm, regardless of degree, which results from preserved charging error, is sufficient to require a reversal of the conviction. Cases involving preserved charging error will be affirmed only if no harm has occurred." ***Id.***, at 351.

before it. Instead, the Court cited with approval the CCA's previously adopted review of ***Penry*** error in which a finding of error subsumed the question of harm:

> Under Almanza, once Smith established the existence of instructional error that was preserved by a proper objection, he needed only to show he suffered "some harm" from that error. In other words relief should be granted so long as the error was not harmless. 686 S. W. 2d, at 171. It would appear this lower standard applies to Smith's preserved challenge to the special issues.
>
> The Court of Criminal Appeals explained in its recent decision in Penry v. State, 178 S. W. 3d 782 (2005), that once a state habeas petitioner establishes "a reasonable likelihood that the jury believed that it was not permitted to consider" some mitigating evidence, he has shown that the error was not harmless and therefore is grounds for reversal. Id., at 786-788 (citing Boyde v. California, 494 U. S. 370 (1990)). We note that the Court of Criminal Appeals stated in dicta in this case that even assuming Smith had established that there was a reasonable probability of error, he had not shown "'actual' harm," 185 S. W. 3d, at 468, and therefore would not even satisfy the lower Almanza standard. We must assume that this departure from the clear rule of Penry v. State resulted from the state court's confusion over our decision in Smith I.
>
> The Court of Criminal Appeals is, of course, required to defer to our finding of Penry error, which is to say our finding that Smith has shown there was a reasonable likelihood that the jury interpreted the special issues to foreclose adequate consideration of his mitigating evidence. See Johnson v. Texas, 509 U. S. 350, 367 (1993). Accordingly, it appears **Smith is entitled to relief under the state harmless-error framework**.

Smith II, 550 U.S. ___, ___, 05-11304, slip op. at 18 (emphasis added). *See and compare*, ***Calderon v. Coleman***, 525 U.S. 141, 152 (1998) (Stevens, J., joined by Souter, Ginsberg & Breyer, dissenting) ("a fair reading of the Chief Justice's opinion for the Court in ***Boyde v. California***. . . indicates that the heightened 'reasonable likelihood' standard endorsed in that case was intended to determine whether an instructional error 'requires reversal.'"(internal

citations omitted).

This Court's approval of the CCA's harm analysis in ***Penry v. State*** 178 S. W. 3d 782, a decision which construed a finding of charge error under ***Boyde*** as *ipso facto* containing *some* harm, and therefore mandating relief, at a minimum suggests that a separate harm analysis is not a part of ***Penry***. The mere fact that jurors were precluded from giving effect to a defendant's mitigating evidence is sufficient to deprive the defendant of a fair trial because the jurors were precluded from considering and giving their moral response to evidence presented in mitigation, separate from simply rebutting the aggravating evidence at trial. This conclusion is consistent with this Court's previous ***Penry*** decisions, in particular ***Penry II***, in which this Court reversed the sentence upon a finding of error, yet subjected a separate claim to a separate harmless error review. ***Id.***, 532 U.S. at 796. Similarly, the Fifth Circuit panel's treatment of ***Penry*** error in Mr. Garcia's case, as well as the En Banc Court's treatment of the error in ***Nelson***, is consistent with this conclusion. Insofar as Petitioner has conceded that there was a reasonable likelihood that the jurors were precluded from giving full effect to all of Mr. Garcia's mitigating evidence, *Petitioner's Brief*, at 32, the basis for certiorari in this case is foreclosed by ***Smith II*** since Mr. Garcia would have experienced *some* harm from the jurors being able to give effect to his mitigation evidence.

CONCLUSION

Certiorari is plainly not warranted in the instant case. This Court has recently rejected

this precise issue in ***Nelson*** and Petitioner has offered no new reason to address this issue, or why this Court was even mistaken in its previous denial of certiorari in ***Nelson***.

Further, due to the uniqueness of the Texas death penalty statue among death penalty jurisdictions coupled with the amendment to the 1991 statute, and the declining number of Texas inmates remaining who were convicted under the statute, the issue carries no jurisprudential significance outside of a handful of Texas inmates.

Moreover, ***Penry*** error is uniquely unsuitable to a harm analysis because the error directly relates to the jurors subjective normative judgments regarding the evidence with which they were unable to give effect. This type of evaluation – in contrast to typical "trial error" is impossible to quantify. It is unnecessary for this Court to clarify this point in light of its prior ***Penry*** jurisprudence, as well as the Fifth Circuit's discussion of this point in ***Nelson***.

Finally, in light of this Court's decision in ***Smith II***, the question has been implicitly resolved against Petitioner. A finding of ***Penry*** error satisfies a showing of sufficient harm to require reversal of a death sentence because the preclusion of the jury from being able to fully consider and give effect to a defendant's mitigation evidence deprives the defendant of a fair trial at punishment through depriving the jurors of a vehicle in giving effect to his mitigating evidence which is either irrelevant to, or bears relevance beyond the scope of the statutory punishment issues.

This Court should therefore deny certiorari.

Respectfully Submitted,

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No._____

In The
Supreme Court of the United States

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Petitioner,

v.

FERNANDO GARCIA,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL APPENDIX

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APPENDIX III

FILED September 17, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FERNANDO GARCIA,	§	
Petitioner,	§	
v.	§	CIVIL ACTION
	§	NO. 3-01-CV-580-G
	§	
DOUG DRETKE,	§	
Director, Texas	§	
Department of Criminal	§	
Justice Criminal	§	
Institutions Division,[1]	§	
Respondent.	§	

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to the provisions of 28 U.S.C. § 636(b), and an Order of the District Court in implementation thereof, the subject cause has previously been referred to the United States. Magistrate Judge. The findings, conclusions, and recommendation of the magistrate judge, as evidenced by his signature thereto, are as follows:

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[1] The "Institutional Division" of the Texas Department of Criminal Justice was recently renamed the "Correctional Institutions Division." Additionally, the previous named respondent in this action was Janie Cockrell. On August 18,2003, Doug Dretke succeeded Cockrell as Director of the Correctional Institutions Division. Under Rule 25(d)(l) of the Federal Rules of Civil Procedure, he "is automatically substituted as a party."

FINDINGS AND CONCLUSIONS:

Type Case: This is a petition for a writ of habeas corpus filed by a state inmate pursuant to 28 U.S.C.§ 2254.

Parties: Petitioner Fernando Garcia ("Petitioner" and "Garcia") is an inmate confined in the Texas Department of Criminal Justice, Correctional Institutions Division (TDCJ-CID) awaiting execution which was imposed as punishment for the offense of capital murder. Respondent is the Director of the TDCJ-CID.

Statement of the Case: Petitioner was convicted ofcapital murder and sentenced to death. *State v. Garcia*, No. F-89-96959-M (194th Judicial Dist. Ct., Dallas, Texas, December 8, 1989). His conviction and sentence were affirmed on direct appeal. *Garcia v. State*, 887 S.W.2d 846 (Tex. Crim. App. 1994). Petitioner filed a petition for writ of certiorari in the United States Supreme Court which was denied. *Garcia v. Texas*, 514 U.S. 1005, 115 S. Ct. 1317 (1995). Petitioner subsequently filed an application for writ of habeas corpus in state court which was denied. *Ex parte Garcia*, No. 45,875-01 (Tex. Crim. App. 2001)(unpublished). The present petition was filed in this court on June 5, 2001. Because the disposition of one of the claims raised therein is informed by the recent opinion in *Robertson v. Cockrell*, 325 F.3d 243 (5th Cir.)(*en banc*), the recommendation in this case was deferred until the petition for writ of certiorari *in Robertson* was denied on August 15, 2003, _U.S. _,71 U.S.L.W. 3760,2003 WL 21313845.

Statement of Facts: As noted by the Texas Court of Criminal Appeals in Petitioner's direct appeal, "[t]he victim, three-year-old Veronica Rodriguez, was discovered missing sometime around 2:00 a.m. on Sunday, August

30, 1987, when her mother, Debbie Rodriguez, returned from an evening out with friends." *Garcia v. State*, 887 S.W.2d at 849. She was found the next day "wrapped in a blanket under appellant's bed next to a wall of the garage" where Petitioner lived, adjacent to the victim's house. *Id.* at 850. "She had been sexually assaulted, beaten, and strangled." *Id.* [P]hotographs of the deceased taken prior to autopsy showing bite marks and bruises ...." *Id.* n.7.

Petitioner does not direct any of his five claims for federal habeas corpus relief to the guilt phase of his trial. Rather, he complains of the trial court's sentencing instructions to the jury and the lack of appellate review of mitigation evidence in the punishment phase of his trial. Respondent's answer observes that Petitioner failed to exhaust his fifth claim for relief but does not seek dismissal for failure to exhaust, instead contending that such claim is procedurally barred and without merit. (Answer at 7.)

Findings and Conclusions: As a threshold matter, Respondent asserts that Petitioner's second and fifth claims for relief are procedurally barred. Federal courts will not consider the merits of a claim resolved by a state court judgment which contains a plain statement that the decision rests upon an independent and adequate state law ground. *See Lee v. Kemna*, 534 U.S. 362,375,122 S. Ct. 877, 885 (2002); *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553-54 (1991); *Michigan v. Long*, 463 U.S. 1032, 1041-42, 103 S. Ct. 3469, 3477 (1983). Therefore, the court addresses these issues first.

To constitute a bar federal review, a state law procedural bar must be "firmly established and regularly followed" at the time that it was violated, *see Ford v. Georgia*, 498 U.S. 411, 423-24, 111 S. Ct. 850, 857 (1991), and the state court's application of the procedural rule

must not otherwise be exorbitant. *See Lee v. Kemna*, 534 U.S. at 376, 122 S. Ct. at 885. When a state prisoner's claims have been found to be procedurally barred by a state court, merits consideration is barred in a § 2254 petition unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged constitutional violation, or establish that imposition of a procedural bar would result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. at 750, 111 S. Ct. at 2565.

In his second claim, Garcia contends that the Texas death penalty statute was applied in violation of his rights under the Eighth and Fourteenth Amendment, because the Texas Court of Criminal Appeals on direct appeal refused to review the sufficiency of the evidence mitigating against a death sentence. (Petition at 8-9.) Respondent asserts the defense that the state habeas court denied this claim on the state law basis that Petitioner procedurally defaulted it by failing to raise it on direct appeal. (Answer at 15-16.) The trial court found in the context of its habeas review that such claim was not properly before the court because Petitioner did not make a specific request in his direct appeal for the Court of Criminal Appeals to review the sufficiency of any alleged mitigating evidence. (State habeas finding, "SHF," No.8; State habeas record, "SHR," at 101). Petitioner has not established an excuse for his procedural default, or shown that application of a procedural bar would result in a fundamental miscarriage of justice. *See Coleman v. Thompson, supra; Stokes v. Anderson*, 123 F.3d 858, 859 (5th Cir. 1997). The magistrate judge finds that Petitioner's second claim is

barred by procedural default.[2]

In Petitioner's fifth claim, he alleges that the Texas death penalty statute is unconstitutional because it prevents the jury from being instructed that a single "holdout juror" could result in the imposition of a life sentence. (petition at 14.) Respondent points out that this claim was never presented to the state courts, and is therefore unexhausted. Because Texas would preclude a successive state habeas claim, the claim is procedurally defaulted for failure to exhaust. *See Beazley v. Johnson*, 242 F.3d 248, 264 (5th Cir.) (citing *Coleman v. Thompson*, 501 U.S. at 735 n. 1, 111 S. Ct. at 2557 n. 1), *cert. denied*, 534 U.S. 945, 122 S. Ct. 329 (2001)). Again, petitioner has not shown that this state law limitation is inadequate, nor has he provided an excuse for his procedural default. The court finds that petitioner's fifth claim is barred by procedural default.[3] The remaining claims will be considered on the merits.

The standard of review in federal habeas proceedings is governed by the Antiterrorism and Effective Death Penalty Act of1996 ("AEDPA"), 28 U.S.C. §2254(d), which

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[2] Alternatively, were the court to find that this claim is not procedurally barred, it should be denied on its merits. The Constitution does not require independent consideration on direct appeal of mitigating circumstances. *Hughes v. Johnson*, 191 F.3d 607,622-24 (5th Cir. 1999), *cert. denied*, 528 U.S. 1145, 120 S. Ct. 1003 (2000).

[3] In the event that this claim was not barred on this basis, it should be denied on alternative grounds. Since the rule that Petitioner proposes has never been required by the Constitution, this claim violates the federal non-retroactivity doctrine announced in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989), and lacks merit. *See Alexander v. Johnson*, 211 F. 3d 895,897-98 (5thCir. 2000); *Webb v. Collins*, 2 F. 3d 93, 9596 (5th Cir. 1993).

provides, in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in a State court proceeding.

28 U.S.C. § 2254(d) (2000). Since the petition in this case was filed after April 24, 1996, the above cited provision of the AEDPA applies to those claims which were adjudicated on the merits. *Lindh v. Murphy*, 521 U.S. 320, 326-27, 117 S. Ct. 2059,2063 (1997). "Resolution on the merits" in the habeas corpus context is a term of art that refers to the state court's disposition of the case on substantive rather than procedural grounds. *Green v. Johnson*, 116 F.3d 1115, 1121 (5th Cir. 1997).

Section 2254(d)(1) concerns pure questions of law as well as mixed questions of law and fact. *Martin v. Cain*, 246 F.3d 471, 475 (5th Cir.), *cert. denied*, 534 U.S. 885, 122 S. Ct. 194 (2001). Under the "contrary to" clause, a federal habeas court may grant the writ of habeas corpus if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or if the state court decides a case

differently from the United States Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362,412-3, 120 S. Ct. 1495, 1523 (2000). With respect to the "unreasonable application" clause, a federal court may grant a writ of habeas corpus if the state court identifies the correct governing legal principle from the United States Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. *Id.* Under *Williams*, a state court unreasonably applies Supreme Court precedent if it "unreasonably extends a legal precedent from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* Section 2254(d)(2) concerns questions off act. *See Moore v. Johnson*, 225 F.3d 495, 501, 504 (5th Cir. 2000), *cert. denied*, 532 U.S. 949, 121 S. Ct. 1420 (2001). Under § 2254(d)(2), federal courts must give deference to state court findings unless they were "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *Chambers v. Johnson*, 218 F.3d 360,363 (5th Cir.) (as modified on denial of rehearing), *cert. denied*, 531 U.S. 1002, 121 S. Ct. 508 (2000). The resolution of actual issues by the state court is presumptively correct and will not be disturbed unless the prisoner rebuts the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

In his first claim for relief, Petitioner contends that the instructions given to the jury in the punishment stage of the trial prevented the jury from effectively responding to or making use of the mitigation evidence produced during trial. This claim relies upon the rule set forth in *Penry v. Lynaugh*, 492 U.S. 302, 322, 109 S. Ct. 2934,2948 (1989) ("*Penry I*"), and *Penry v. Johnson*, 532

U.S. 782. 797. 121 S. Ct. 1910. 1920 (2001) ("*Penry II*"). In *Penry I*, the Supreme Court held that the two special issues provided to the jury in the punishment phase of a Texas capital murder trial were inadequate to give effect to mitigating evidence admitted before the sentencing jury of Penry's mental retardation and severe child abuse. 492 U.S. at 322. 109 S. Ct. at 2948. Because the Texas Legislature had not amended the Texas capital murder statute prior to Garcia's trial, the trial court inserted an additional instruction concerning mitigation evidence, as follows:

> You are instructed that you shall consider any evidence which, in your opinion, mitigates against the imposition of the death penalty. In making this determination you shall consider any aspects of the defendant's background, character or record and the facts and circumstances of the offense. If you believe from the evidence that the State has proven beyond a reasonable doubt that the answers to the Special Issues are "Yes." but you are further persuaded by the mitigating evidence that the defendant should not be sentenced to death in this case. or you have a reasonable doubt as to whether the death penalty should be imposed against the defendant, then you shall answer one or both of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed in this case.
>
> Mitigating circumstances are circumstances which do not constitute a justification or excuse for the offense in question. but which. in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability.

(State clerk's trial record. "Tr.," at 199-200.) This form of instruction was expressly disapproved in *Penry II.* 532 U.S. at 798-800, 121 S. Ct. at 1921-22.

However, since petitioner was not entitled to a special mitigation instruction, the mere inclusion of this supplemental instruction does not entitled him to habeas corpus relief. "In the, absence of *Penry*-quality mitigating evidence, the presentation of this instruction does not constitute error of any sort." *Robertson v. Cockrell,* 325 F.3d at 257. In order to determine what constitutes *Penry*-quality or constitutionally relevant mitigating evidence entitling a capital murder defendant to a special mitigation instruction. the evidence must show that the criminal act was "due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own." *Robertson,* 325 F.3d at 251 (quoting *Graham v. Collins,* 950 F.2d 1009, 1029 (5th Cir. 1992)(*en banc*), *aff'd,* 506 U.S. 461, 113 S. Ct. 892 (1993).

Petitioner claims that the sexual assault and murder of the three-year-old girl in this case was due to his pedophilia resulting from sexual abuse he received as a child. However, pedophilia has never been held to be the type of uniquely severe permanent handicap requiring a special mitigation instruction."[4] In fact, his own expert testified during the punishment stage of his trial that Petitioner "had no evidence of any kind of mental illness

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[4] In *Bigby v. Cockrell,* 340 F.3d 259 (5th Cir. 2003), *pet. for rehearing en banc filed* (Aug. 8, 2003)(No. 99-11262), the Fifth Circuit Court of Appeals recently invalidated a case involving a similar nullification instruction by expanding the categories of constitutionally relevant mitigating evidence to include chronic paranoid schizophrenia. In light of the other factors present, the ruling in *Bigby* does not authorize a further expansion on account of Petitioner's pedophilia. Therefore, it does not change the outcome of this case.

or psychosis. He has a ... personality disorder of mixed variety, which basically means a long standing pattern of behavior traits and attitudes that cause some maladjustment in life. And he's what we classically call a pedophile, pedophilia." (SOF XXI at 2861). Further, the special instruction concerning future dangerousness allowed a vehicle for the jury to give effect to this evidence, since he would presumably have no contact with children while serving his life sentence in prison.[5] In fact, this was the precise defensive theory that Garcia's attorneys elicited from both the prosecution's expert (SOF XXI at 2807) and his own expert (SOF XXI at 2869, 2871, 2882), which they emphasized in closing argument. (SOF XXI at 2921-22.) Finally, Petitioner alleges that the evidence admitted before the jury at the punishment phase of this trial shows that his own "substance abuse was clearly a precipitating factor to his behavior." (Petition at 7; SOF 21 at 2869, 2871; SOF 21 at 2853). A defendant's use of illegal drugs or the abuse of legal drugs does not constitute a permanent handicap which occurred through no fault of his own. *See Cordova v. Collins*, 953 F.2d 167, 170 (5th Cir. 1992). Therefore, Petitioner's first claim for relief should be denied.

In his third claim for relief, Petitioner contends that he was denied the effective assistance of counsel on direct appeal because his lawyers failed to raise certain issues

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[5] The second special issue submitted to the jury asked "[i]s there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?" (Tr. at 199.) The instructions also provided that in the event of a negative answer to any special issue "the Court shall sentence the defendant to confinement in the Texas Department of Corrections for life." (*Id.* at 200.)

that would have resulted in a new trial or reduced punishment. In particular, petitioner complains that the performance of his state appellate counsel was deficient in failing to request that the Texas Court of Criminal Appeals independently review the mitigation evidence to determine the appropriateness of the jury's implied negative response to the mitigation evidence. Appellate counsel's performance on appeal is judged under the two-pronged standard set forth *Strickland v. Washington*, 466 U.S. 668, 698, 104 S. Ct. 2052,2070 (1984). *See Smith v. Robbins*, 528 U.S. 259,285-86, 120 S. Ct. 746, 764 (2000); *Briseno v. Cockrell*, 274 F.3d 204,207 (5th Cir. 2001). The first prong of *Strickland* requires a showing of deficient performance, *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064. To prove deficiency, a defendant "must show that counsel's performance fell below an objective standard of reasonableness." *Id.* This requires a showing that the errors made by his counsel were so serious that such counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* Petitioner must show that the performance ofhis appellate counsel was deficient in an objectively unreasonable manner. *Robbins*, 528 U.S. at 285, 120 S. Ct. at 764. Further, "[t]he Constitution does not require appellate counsel to raise every nonfrivolous ground that might be pressed on appeal." *Ellis v. Lynaugh*, 873 F.2d 830,840 (5th Cir.), *cert. denied*, 493 U.S. 970, 110 S. Ct. 419 (1989). Instead, appellate counsel should winnow out "weaker arguments on appeal" and focus on "one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983) (holding that judges should not second-guess reasonable professional judgments and impose a duty on appointed counsel to raise every colorable claim suggested by a client).

The second prong of this test requires a showing of

prejudice by demonstrating that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.[6] *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. A habeas petitioner must not show merely that the result would have been different if his attorney had taken a different action, but also that the result of the proceeding was fundamentally unreliable or unfair. *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S. Ct. 838, 842 (1993). Regarding appellate representation, a habeas petitioner must "show a reasonable probability that, but for his counsel's unreasonable failure ... he would have prevailed on his appeal." *Briseno*, 274 F.3d at 207 (citing *Smith*, 528 U.S. at 285, 120 S. Ct. at 764). The court need not address both prongs of the *Strickland* standard if the complainant has made an insufficient showing on one. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069. Under this standard, petitioner's complaint should be denied.

Petitioner's appellate counsel raised 26 points of error, including stronger grounds than the one suggested in his third claim. Therefore, Petitioner has not shown that the conduct of his appellate counsel was anything other than a reasonable appellate strategy to limit his appeal to the stronger issues. But even if it were deficient, Petitioner has failed to demonstrate a reasonable probability that this issue would have prevailed on his direct appeal. In fact, the evidence shown in the state record filed in this petition supports the "implied negative response" to the

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[6] A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

mitigation evidence.[7] Therefore, Petitioner has failed to

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[7] The facts of the offense are particularly heinous. The three-year-old victim was the daughter of the people that befriended Petitioner, got him a job, and provided him a place to live. (SOF XIX at 2508-12.) While her family slept close by, she was kidnaped from her bedroom, bitten in at least 13 places on her body, and sexually assaulted so violently that her birth canal was torn from front to back. (SOF XVIII at 2383-86, 2407-09,2416-17,2421; SOF XIX at 2465-66,2486,2500-01,2520,2522; SOF XX at 2652-53, 2657-66). Afterwards, the small child was strangled by the neck for five to six minutes causing her death, followed by blunt-force trauma capable of causing her death. (SOF XVIII at 2401-07,2409-12,2437.) Her body was found stuffed under Petitioner's mattress, concealed in one of his bed sheets. (SOF XVIII at 2354-56,236869,2379-80.)

Petitioner's I.Q. of 110, talent, and background provided little in the way of mitigation. (SOF XXI at 2787, 2876.) His father died when he was very young, and he claimed that he was abandoned by his mother (SOF XXI at 2861) and raised by his elderly grandmother. (SOF XXI at 2785,2861.) He also told his court-appointed psychologist that he had been sexually abused as a child. (SOF XXI at 2861-62). He dropped out of school at the tenth grade (SOF XXI at 2785), abused substances (SOF XXI at 2785-86), and was arrested for theft as a juvenile. (SOF XXI at 2786). He also offered evidence that he was a good employee. (SOF XXI at 2885.) The evidence also showed that he had committed other offenses involving violence and sexual assault. He sexually assaulted his girlfriend's five-year-old daughter, and physically abused his girlfriend and her eight-year-old son. (SOF XXI at 2825-28, 2835-37, 2840-42.) He has been convicted of sexual assault and burglary of a habitation. (SOF XX at 2706-13,2724-28.) He told his court appointed psychologist that he did not remember much about the instant offense except that he remembered being on top of the victim and then waking up with her in the bed and putting her under the bed. (SOF XXI at 2876.)

Petitioner's defensive theory presented in the punishment phase did not emphasize mitigation, but rather lack of deliberation and future danger. Arguably the evidence in the punishment phase showed an absence of deliberateness since Garcia was intoxicated at the time. (SOF

satisfy either prong of the *Strickland* test, and this claim should be denied.

In his fourth claim for relief, Petitioner contends that the trial court's refusal to define a life sentence in the instructions to the jury deprived him of his rights under the Eighth and Fourteenth Amendments to an individualized assessment of the appropriateness of the death penalty. Although no authority is cited in support of this proposition, this argument appears to be an extension of *Simmons v. South Carolina*, 512 U.S. 154, 161-62, 114 S. Ct. 2187, 2193 (1994), and *Shafer v. South Carolina*, 532 U.S. 36, 121 S. Ct. 1263 (2001), wherein the Supreme Court has held that such an instruction is necessary when one of the options to the death penalty is life without parole. However, Texas does not authorize a sentence of life without the possibility of parole. *See Collier v. Cockrell*, 300 F.3d 577, 583 (5th Cir. 2002), *cert. denied*, 537 U.S. 1084, 123 S. Ct. 690 (2002). Therefore, such an extension would violate the non-retroactivity doctrine of *Teague*. *See Id.*; *Woods v. Cockrell*, 307 F.3d 353, 361-62 (5th Cir. 2002). Moreover, even if this claim were not *Teague*-barred, the fact that this Circuit has

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XX at 2746, 2750; SOF XXI at 2777,2778-79,2799-2801,2853-54,2865,2868,2876). Evidence also suggested that he would not be a future danger to society if given a life sentence in prison, based upon expert testimony from his own expert as well as the expert for the State that Petitioner, as a pedophile, would only be dangerous to children and not to other adults. (SOF XXI at 2807, 2861, 2871,2882.) Because of the emotional nature of the state's case (SOF XXI at 2913-14), his attorney's closing argument sought to encourage a logical rather than emotional view of the evidence (SOF XXI 2913-20), avoiding passion and sympathy (SOF XXI at 2920), and instead emphasizing evidence showing a lack of deliberateness (SOF XXI at 2919-21), and that if sent back to prison for life Petitioner would commit no criminal acts of violence. (SOF XXI at 2921-22).

refused to apply *Simmons* and *Shafer* to the Texas capital offense punishment scheme forecloses any argument that the Texas Court of Criminal Appeals' rejection of this claim applied Supreme Court precedents in an objectively unreasonable manner.

Conclusion: Although the magistrate judge has examined Garcia's claims which were decided by the Texas Court of Criminal Appeals on the merits in a fashion akin to de novo, independent review on matters of law, the Supreme Court has recently made clear in *Price v. Vincent*, _U.S._, 123 S. Ct. 1848, 1853-54 (2003), that relief is unavailable to a § 2254 petitioner absent a showing that the state court applied decisions of the Supreme Court in an objectively unreasonable manner. Garcia has not discharged this burden.

RECOMMENDATION:

For the foregoing reasons it is recommended that the petition for a writ of habeas corpus be denied.

A copy of this recommendation shall be transmitted to counsel for the parties.

DATED: September 16th, 2003.

s/ Wm F. Sanderson, Jr.
WM. F. SANDERSON, JR.
UNITED STATES MAGISTRATE JUDGE

NOTICE

In the event that a party wishes to object to this recommendation, you are hereby notified that you must file your written objections within ten (10) days after being served with a copy of this recommendation. Pursuant to *Douglass v. United States Services Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996 (*en banc*) a party's failure to file written objections to these proposed findings of fact and conclusions of law within such ten day period may bar a de novo determination by the district judge of any findings of fact or conclusions of law and shall bar such party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed findings of fact and conclusions of law accepted by the district court.

APPENDIX IV

FILED October 6, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FERNANDO GARCIA	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 3-01-CV-580-G
	)	
DOUGLAS DRETKE, Director, Texas Department of Criminal Justice, Criminal Institutions Division	)	

ORDER

After making an independent review of the pleadings, files and records in this case, and the Findings, Conclusions and Recommendation of the United States Magistrate Judge, I am of the opinion that the findings and conclusions of the Magistrate Judge are correct and they are adopted as the findings and conclusions of the Court.

IT IS, THEREFORE, ORDERED that the findings, conclusions and recommendation of the United States Magistrate Judge are adopted.

SIGNED this 6, day of October, 2003.

s/ A. Joe Fish
A. JOE FISH
UNITED STATES DISTRICT JUDGE

APPENDIX V

FILED October 6, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FERNANDO GARCIA	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 3-01-CV-580-G
	)	
DOUGLAS DRETKE, Director, Texas Department of Criminal Justice, Criminal Institutions Division	)	

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered, It is ORDERED, ADJUDGED AND DECREED that the petition be, and it is hereby, denied and dismissed.

IT IS FURTHER ORDERED that the Clerk shall transmit a true copy ofthis judgment and the order adopting the Findings, Conclusions and Recommendation ofthe United States Magistrate Judge, to counsel for the parties.

SIGNED this 6, day of October,2003.

s/ A. Joe Fish
A. JOE FISH
UNITED STATES DISTRICT JUDGE

APPENDIX VI

FILED January 20, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FERNANDO GARCIA, *Petitioner,*	)	
v.	)	CIVIL ACTION
	)	NO. 3-01-CV-580-G
DOUG DRETKE, Director, Texas Department of Criminal Justice, Criminal Institutions Division, *Respondent.*	)	

CERTIFICATE AS TO APPEALABILITY

A Notice of Appeal has been filed in the above captioned action in which:

(X) the District Court has entered a final order in a habeas corpus proceeding brought pursuant to 28 U.S.C. § 2254.

( ) the District Court has entered a final order in a proceeding pursuant to 28 U.S.C. § 2255.

Pursuant to Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253(c), the undersigned Magistrate Judge finds and recommends as follows:

IFP STATUS:

(X) the party appealing should be GRANTED leave to proceed informa pauperis.

( ) the party appealing is proceeding in forma pauperis.

( ) the party appealing should be DENIED leave to proceed in forma pauperis for the following reason(s):

( ) the Court recommends that the District Court certify, pursuant to Fed. R. App. P. 24(a) and 28 U.S.C. § 1915(a)(3), that the appeal is not taken in good faith;

( ) the person appealing is not a pauper because he has paid the appellate filing fee;

( ) the person appealing has not complied with the requirements of Rule 24 ofthe Federal Rules of Appellate Procedure and/or 28 U.S.C. § 1915(a)(1) as ordered by the Court. (See Notice of Deficiency and Order entered on _____).

COA:

(X) a Certificate of Appealability should be GRANTED in part. (See reasons set forth below).

(X) a Certificate of Appealability should be DENIED in part. (See reasons stated below).

REASONS: A Certificate of Appealability should be GRANTED on the following issue: Petitioner's first claim for relief asserting that the trial court violated petitioner's federal constitutional rights under the Eighth and Fourteenth Amendments by charging the jury with a "nullification" instruction which failed to give effect to petitioner's mitigation evidence. See, e.g., *Smith v. Cockrell*, 311 F.3d 661, 680 (5th Cir. 2002), *cert. granted*, _ U. S. _, 124 S.Ct. 46, 156 L.Ed.2d 703 (2003). A Certificate of Appealability should be DENIED on all other issues. The Court hereby incorporates by reference the Findings and Recommendation of the United States

Magistrate Judge, entered on September 17,2003, adopted by the District Court on October 6, 2003, in support of it s finding that Petitioner has failed to make a substantial showing of the denial of a federal constitutional right on all other issues. *See Slack v, McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1602, 146 L. Ed .2d 542 (2000) (holding that a substantial showing of the denial of a federal constitutional right is established by demonstrating either that jurists of reason could disagree with the district court's resolution of a claim or that jurists could conclude that the issues presented are adequate to deserve encouragement to proceed further); see also *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d931 (2003).

SIGNED this 20th day of January, 2004.

s/ Wm. F. Sanderson, Jr.
WM. F. SANDERSON, JR.
UNITED STATES MAGISTRATE JUDGE

ORDER OF THE COURT
ON THE FOREGOING RECOMMENDATION

Considering the record in this case and the above recommendation, and pursuant to Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253 (c), the Court hereby finds and orders:

IFP STATUS:

(X) the party appealing is GRANTED in forma pauperis status on appeal.
( ) the party appealing is proceeding in forma pauperis.

( ) the party appealing is DENIED informa pauperis status on appeal.
for the following reasons:

( ) the Court certifies, pursuant to Fed. R. App. P. 24(a) and 28 U.S.C. § 1915 (a)(3), that the appeal is not taken in good faith. In support of this finding, the Court adopts and incorporates by reference the Magistrate Judge's Findings and Recommendation entered in this case on. Based upon the Magistrate Judge's findings, this Court finds that the appeal presents no legal points of arguable merit and is therefore frivolous. See *Harkins v. Roberts*, 935 F. Supp. 871, 873 (S. D. Miss. 1996) (citing *Howard v. King*, 707 F. 2d 215,219-20 (5th Cir. 1983)).

( ) the person appealing is not a pauper;

( ) the person appealing has not complied with the requirements of Rule 24 of the Federal Rules of Appellate Procedure and / or 28 U.S.C. § 1915(a)(1) as ordered by the Court. (See Notice of Deficiency and Order entered on).

COA:

(X) a Certificate of Appealability is GRANTED in part on the following issue: Petitioner's first claim for relief asserting that the trial court violated petitioner's federal constitutional rights under the Eighth and Fourteenth Amendments by charging the jury with a "nullification" instruction which

failed to give effect to petitioner's mitigation evidence.

(X) a Certificate of Appealability is DENIED in part on all other issues. The Court hereby adopts and incorporates by reference the Magistrate Judge's Findings and Recommendation entered in this case on September 17,2003, in support of its finding that Petitioner has failed to make a substantial showing of the denial of a federal constitutional right. See *Slack v. Mclianiel*, 529 U.S. 473, 120 S. Ct. 1595, 1602, 146 L. Ed .2d 542 (2000).

SIGNED this 20, day of January, 2004.

s/ A. Joe Fish
A. JOE FISH
UNITED STATES DISTRICT JUDGE

(1)

(2)

No. 07-1052

FILED
MAR 18 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Petitioner,

v.

FERNANDO GARCIA,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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In 1987, Garcia visited unspeakable horrors on three-year-old Veronica Rodriguez. For that crime, and after a constitutionally fair trial, he was sentenced to death. In 2007, based on this Court's recent pronouncements in *Abdul-Kabir*[1] and *Brewer*,[2] the court of appeals determined that in fact, Garcia's trial had been infected with constitutional error. But this error did not involve any of the hallmarks of a fair trial. He was not tried by a biased trial judge; he was not denied counsel, and he was not denied the right to represent himself. No racial discrimination tainted the selection of the grand jury. This was a public trial. And the reasonable-doubt instruction given to the jury was in no way defective. Rather, the jury instructions at the punishment trial — instructions that had been approved of since 1976 — did not permit the jury to give their "reasoned moral response" to Garcia's mitigating evidence. Disregarding the boundaries of federal habeas review and the well-established precedents of this Court, the court of appeals refused to pass on the question of whether this *Penry* error[3] — simple jury-charge error — can ever be amenable to harmless-error analysis. For these reasons, certiorari review should be granted.

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[1] *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007)

[2] *Brewer v. Quarterman*, 127 S. Ct. 1706 (2007).

[3] *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Penry v. Johnson*, 532 U.S. 782 (2001).

I. The Denial of Certiorari Review in *Nelson v. Quarterman* Was Not a Reflection on the Merits of the Question Presented. In Any Event, the Instant Case is Easily Distinguished.

Garcia spends a great deal of time arguing that the denial of certiorari review in *Quarterman v. Nelson*[4] forecloses certiorari review in the instant case. BIO at 10-13.[5] But this Court has reiterated time and time again that such "imports no expression of opinion upon the merits of the case." *Teague v. Lane*, 488 U.S. 288, 296 (1989) (citing *United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 366, n. 1 (1973); *Brown v. Allen*, 344 U.S. 443, 489-497 (1953)). *See also Equality Found. of Greater Cincinnati, Inc., v. City of Cincinnati*, 119 S. Ct. 365, 365-66 (1998) (opinion of Stevens, J., respecting the denial of the petition for writ of certiorari). Nor does it constitute "an appraisal of [the] merits [of the questions presented]." *Brown v. Texas*, 522 U.S. 940, 940 (1997) (opinion of Stevens, J., respecting the denial of the petition for writ of certiorari). Indeed, "[t]he 'variety of considerations [that] underlie denials of the writ,' counsels against according denials of certiorari any precedential value." *Teague*, 488 U.S. at 296 (quoting *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917 (1950) (opinion of Frankfurter, J.)). The only thing that can be gleaned from a denial of certiorari with any certainty is that four Justices could not agree that the

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[4] 127 S. Ct. 2947 (2007).

[5] "BIO" refers to the brief in opposition to certiorari review filed by Respondent Fernando Garcia, followed by page numbers. "PA" refers to the appendix to the Director's petition for certiorari review.

merits of the case should be heard. That aside, *Nelson* and *Garcia* present markedly different cases.

In *Nelson*, there was no prior criminal history to offer, so the State's evidence of future dangerousness centered on Nelson's violent nature and history of substance abuse. Tony Spence and his ex-girlfriend, Donna Dugger, friends of Nelson's, testified that Nelson drank "quite a bit" and used cocaine and marijuana. 4 RR 589; 5 RR 616-18.[6] Spence stated that Nelson angered easily when he was under the influence of drugs; on one occasion Nelson assaulted him for talking during a movie. 4 RR 592; 5 RR 623. Spence, along with Scott Simpson and Babbette Unthank, testified that Nelson also attempted to beat Simpson with a baseball bat because Unthank accused Nelson's brother of child molestation. 4 RR 594-600; 5 RR 603-669. Dugger also stated that she witnessed Nelson assault an individual in a grocery store parking lot. 5 RR 619-620.

Phillip Corbin and Elizabeth Torres, Howard County, Texas jailers, testified that while incarcerated awaiting trial, Nelson locked Corbin in a cell and then challenged him verbally and, on another occasion, evaded a bed check and hid in the hallway. 5 RR 686-690, 704-706. While Nelson claimed he was only playing a practical joke, his true intent appeared to be an escape. *Id.* at 730-731. Makeshift weapons — wire, broken razor blades, and a piece of tin from a coke can — were found secreted in the hallway where he had been hiding. *Id.* at 718, 722-723.

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[6] "RR" refers to the Reporter's Record of transcribed trial proceedings in *State v. Nelson*.

Against this, and in mitigation, Nelson presented evidence that

> (1) he was rejected by his mother, who had completely abandoned him by age [fourteen] ("abusive childhood" evidence); (2) he abused drugs and alcohol ("substance abuse" evidence); (3) he has troubled relationships with women; (4) he had a child out of wedlock, with whom he was not permitted to have a relationship; and (5) a psychiatrist testified he was suffering from borderline personality disorder ("mental disorder" evidence).

Nelson v. Quarterman, 472 F.3d 287, 290 (5th Cir. 2006) (*en banc*). *See also id.* at 303-05.

Thus, when faced with the question of whether the *Penry* error in Nelson's case was harmless, a review of the record might well "leave[] a conscientious judge in grave doubt about the likely effect of an error on the jury's verdict." *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995). "Grave doubt" means that, "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." *Id.* And where there is "grave doubt," *O'Neal* mandates that relief be granted. *Id.* at 445. This is not the situation in the instant case.

Quite unlike Nelson, Garcia had an extensive and escalating criminal history, and each conviction involved a sexual assault or an attempted sexual assault. Each time, Garcia was given another chance to become a productive member of society. Each time he chose otherwise. Indeed, Garcia was on parole when, "[w]ith

extraordinary cruelty, [he] sexually abused and murdered [] three-year-old [Veronica Rodriguez] in 1987." PAI:2 (footnote omitted). A man with a 110 I.Q., Garcia created myriad excuses for his criminal behavior. He also claimed to be a born-again Christian, but absolutely nothing in the testimony heard during the punishment trial corroborates this. Certainly nothing about Garcia's own behavior reflects his alleged religious convictions.

Garcia told Dr. Powitzky that he had been neglected, exposed to witchcraft and other "bizarre experiences," and sexually abused as a child, but Dr. Powitzky admitted that he had been unable to verify this. The background he described to Dr. Schroeder stands in stark contrast to this: Garcia

> indicated that he was adopted at birth, and he never really knew his natural father. Apparently, his [grandparents] adopted him. His grandfather died prior to his birth. At that point, his adopted mother was [eighty-one] years old ... and lived with his brother and subsisted on Social Security. Apparently he had two natural brothers, one natural sister.

21 SF 2785.[7] Most tellingly, Garcia never discussed the sexual abuse supposedly perpetrated on him by his own mother and brother and others.

Garcia points out that a *Penry* analysis is not "'a matter purely of quantity, degree, or immutability.'" BIO at 20 (quoting *Brewer*, 127 S. Ct. at 1712). The Director

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[7] "SF" refers to the "Statement of Facts," the reporter's record of transcribed trial proceedings in *State v. Garcia*.

has never suggested otherwise. Such considerations, however, are wholly appropriate when conducting a harmless-error analysis. With that in mind, then, a thorough review of the record leaves no doubt that the *Penry* error was harmless. "[T]he evidence was not merely sufficient, but so powerful [and] overwhelming [] that the error simply [cannot] be said to have swayed the jury's judgment." *Cooper v. Taylor*, 103 F.3d 366, 370 (4th Cir. 1996) (*en banc*). Certiorari review should be granted.

II. The Director's Harmless-error Argument Is Properly Presented for Certiorari Review and Is Not Waived.

While it is true that harmlessness was not argued by the Director until late in the day, the lower court did not find, or even suggest, that the argument had been waived. Rather, the lower court specifically refused to address the question because it has not been passed on by this Court:

> That this instructional error mandates reversal of the death sentence flows from *Abdul-Kabir* and our en banc decision in *Nelson v. Quarterman*, 472 F.3d 287 []. Neither of those decisions, however, alters the basic rule that for "virtually all" other collateral challenges to state court convictions the appropriate standard of review is the "substantial and injurious effect" harmless error test found in *Brecht v. Abrahamson*. *See Fry v. Pliler*, 127 S. Ct. 2321, 2325 (2007) (citing *Brecht* [*v. Abrahamson*], 507 U.S. 619, 631 (1993)). Moreover, the question of whether some types of *Penry* error might be subject to harmless error review has not been squarely decided by and

> remains unsolved by the United States Supreme Court. *Smith v. Texas*, 127 S. Ct. 1686, 1699 (2007) [("*Smith II*")] (Souter, J., concurring).

PAI: 13.[8] Garcia's attempts to persuade this Court otherwise are unavailing when considered in this light. *See* BIO at 13-15.

In any event, this Court has previously considered whether constitutional error is harmless *sua sponte*, despite the fact that it had not been previously argued. *See Yates v. Evatt*, 500 U.S. 391, 407 (1991) ("[W]e have the authority to make our own assessment of the harmlessness of a constitutional error in the first instance.") (citation omitted); *Rose v. Clark*, 478 U.S. 570, 584 (1986) ("[W]e 'plainly have the authority' to decide whether, on the facts of a particular case, a constitutional error is harmless under the *Chapman* standard.")[9] (citing *United States v. Hastings*, 461 U.S. 499, 510 (1983)).[10]

In *Hastings*, the Court cautioned that reviewing records to determine harm should be done "sparingly." 461 U.S. at 510 (citations omitted). A primary concern should be, and is, judicial economy. *Yates*, 500 U.S. at 407 ("Because this case has already been remanded twice, once for harmless-error analysis, we think we

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[8] Contrary to Garcia's arguments, that Justice Souter was compelled to make the statement he did strongly suggests that a harm analysis is *not* subsumed within the question of whether there was *Penry* error in the first place. *See* BIO at 22-25.

[9] *Chapman v. California*, 386 U.S. 18 (1967).

[10] *Cf. Teague*, 489 U.S. at 300 (addressing retroactivity despite the fact that it was raised only in an amicus brief).

would serve judicial economy best by proceeding now to determine whether the burden-shifting jury instructions were harmless."). Concurring in *Nelson*, Judge Dennis cited *United States v. Giovanetti*, 928 F.3d 225 (7th Cir. 1991) (per curiam) (on reh'g), which does weigh judicial economy. 472 F.3d at 331-32. There, the Seventh Circuit determined that a decision to "overlook a failure to argue harmlessness" should consider (1) "the length and the complexity of the record," (2) "whether the harmlessness of the error or errors found is certain or debatable," and (3) "whether a reversal will result in protracted, costly, and ultimately futile proceedings in the district court." *Giovanetti*, 928 F.2d at 227. Judge Dennis applied these factors and concluded that it was "clear" harmlessness should not be considered *sua sponte*. *Nelson*, 472 F.3d at 332. But this analysis did not consider that "the arguments that the [Director] does make provide assistance to the court on the harmlessness issue." *United States v. Rose*, 104 F.3d 1408, 1415 (1st Cir. 1997). *See also United States v. McLaughlin*, 126 F.3d 130, 135 (3rd Cir. 1997) (remarking that "the certainty of harmlessness does not appear with such clarity from an *unguided search of the record* that we should raise the issue on our own motion.") (internal quotation marks and citation omitted) (emphasis added).

More importantly, the *Giovanetti* factors do not consider the unique concerns underlying federal habeas review. The AEDPA was specifically enacted to prevent abuses and delays in habeas corpus litigation. It has specific and strictly enforced rules regarding successive petitions and exhaustion. *See* 28 U.S.C. §§ 2244(a), (b); 2254(b), (c). These rules were crafted to ensure piecemeal litigation was a thing of the past and to prevent petitioners from being in charge of the litigation, deciding

when and how to bring their claims into federal court. Judicial economy and fairness, respect for the state courts, comity and the importance of a final judgment all played into the enactment of this legislation. *E.g.*, *McClesky v. Zant*, 499 U.S. 467, 489-93 (1991).

It is these concerns that have provided guidance on the issue of whether a federal court may apply an affirmative defense — exhaustion, non-retroactivity, procedural default — not raised by the State or, alternatively, consider such a defense raised for the first time on appeal. *See Granberry v. Greer*, 481 U.S. 129, 133 (1987) (federal appellate courts have discretion to consider the issue of exhaustion *sua sponte*); 28 U.S.C. § 2254(b)(3) (same); *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) (federal courts may *sua sponte* raise the issue of *Teague* non-retroactivity); *Trest v. Cain*, 522 U.S. 87, 90 (1997) (recognizing that courts of appeals have all held that a procedural default may be raised *sua sponte*). Additionally, the Court has recognized that the State is "entitled to rely on any legal argument in support of the judgment below," even arguments not presented to the lower courts. *Schiro v. Farley*, 510 U.S. 222, 228-29 (1994) (citing *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970)).

Recently, the Court reaffirmed the reasoning of *Granberry*, *Caspari*, and *Trest*, and held that a federal court may *sua sponte* apply the AEDPA statute of limitations against a habeas petitioner where the State has failed to do so, as long as: (1) the parties are accorded notice and an opportunity to address the issue; (2) the petitioner is not prejudiced by any delay; and (3) the interests of justice are served. *Day v. McDonough*, 547 U.S. 198, 210-11 (2006). The *Day* Court explained that

the statute of limitations "'promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments while the record is fresh, and lends finality to state court judgements within a reasonable time.'" *Id.* at 205-06 (quoting *Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000)).

The *Day* factors are specifically suited to the harmless-error context. The *Brecht* harmless-error standard rests on the same policy justifications as exhaustion, non-retroactivity, procedural default, and limitations. Namely, "the State's increased interest in the finality of convictions," comity, and federalism during collateral review. *Brecht*, 507 U.S. at 635. Thus, this Court should be permitted to *sua sponte* raise harmless error in any case in which it might also raise exhaustion, non-retroactivity, limitations, or procedural default where the *Day* factors are satisfied. Importantly, Garcia has not suggested how he was or might be prejudiced by any delay. And given that the facts underlying any harmless-error review are the same as those involved in a *Penry* analysis — they are merely viewed through a different lens — it is questionable whether he could even make such a showing. And as in *Day*, nothing in the record suggests that the Director "strategically withheld the defense or chose to relinquish it" in this case.[11] 547

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[11] *See Saldano v. Cockrell*, 267 F.Supp.2d 635, 644 (E.D. Tex. 2003) ("The respondents'[s] failure to raise the harmless error defense in those cases[] was due to either inadvertence or a mistaken belief that the issue would not be material, rather than the product of deliberate waiver."). Indeed, that a *Penry* claim might be subject to a harmless-error analysis answer was first raised by a judge on the court of appeals. *See Nelson v. Dretke*, 442 F.3d 282, 310-11 (5th Cir. 2006) (Dennis, J., concurring in the judgment).

U.S. at 211.

The AEDPA circumscribes the role of federal courts to ensure only that persons do not remain in custody because of violations of the United States Constitution, or its laws and treaties. *See* 28 U.S.C. § 2254(a). As this Court has explained, unless a defendant is in custody due to a constitutional, or other, violation, federal courts must yield to the state judicial process. *See Barefoot v. Estelle*, 463 U.S. 880, 887-88 (1983). "Thus, before granting the writ of habeas corpus to a petitioner whose state custody resulted from a criminal conviction, we must determine whether the petitioner's trial violated his federal rights and whether that violation was the cause of his detention, i.e., whether the error was harmful." *Cooper*, 103 F.3d at 370. The interests of justice — finality, comity, and federalism — strongly favor consideration of whether *Penry* error can ever be amenable to a harmless-error analysis. Therefore, certiorari review should be granted.

III. The Question Presented Has Relevance Well Beyond the Context in which It Is Raised.

The question of whether *Penry* error is amenable to a harmless-error analysis may, at first blush, seem like a narrow one. *See* BIO at 16-18. It is not. It should not be considered solely in the context of those few remaining Texas-death-row inmates that may be affected by this Court's *Penry* jurisprudence. It should not be brushed aside simply because the lower court's opinion is unpublished. Rather, the question should be considered, as the Director asserted in his petition, in the broad scheme of what is — and is not — trial error.

In *Nelson*, the court of appeals determined that the because the jury charge error at issue arose in the context of a death penalty trial — and thus involved a "moral judgment" — it is structural error subject to automatic reversal. 472 F.3d at 314-15. The court then used *Nelson* to avoid a harm analysis in the instant case. PAI: 13. But the reasoning of *Nelson* finds no support in this Court's precedents.

First, *Penry* error is nothing more than jury-charge error. *See Smith II*, 127 S. Ct. at 199 (Alito, J., dissenting) ("The federal constitutional error that occurred in the penalty phase of petitioner's trial and that was identified in *Smith v. Texas*, 543 U.S. 37 [] (2004) (*per curiam*) [], concerned a flaw in the jury instructions[.]"). As such, *Nelson*'s determination flies in the teeth of this Court's well-established precedent holding that jury charge error is nearly always trial error and thus subject to a harm analysis. *See* Petition at 25-26 (listing cases). Second, merely because it arises in the context of a death penalty case does not mean that it automatically gives rise to structural error. As this Court recognized in *Mitchell v. Esparaza*, "a number of our harmless-error cases have involved capital defendants[.]" 540 U.S. 12, 16-17 (2003) (per curiam) (citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) (unconstitutional admission of coerced confession at guilt stage); *Clemons v. Mississippi*, 494 U.S. 738 (1990) (unconstitutionally broad jury instructions at sentencing stage); *Satterwhite v. Texas*, 486 U.S. 249 (1988) (unconstitutional admission of evidence at sentencing stage), and *Ring v. Arizona*, 536 U.S. 584, 609, n. 7 (2002) ("We do not reach the State's assertion that any error was harmless because a pecuniary gain finding was implicit in the jury's guilty verdict.")).

Importantly, this Court has just recently granted certiorari review in a case where the Court of Appeals for the Ninth Circuit held that a jury charge error involving instructions on alternative theories of criminal liability was in fact structural, thus subject to automatic reversal. *Chrones v. Pulido*, — S. Ct. — , 2008 WL 482035 (Feb. 25, 2008) (No. 07-544). Like the court of appeals in that case, the court of appeals in this case has created a potentially enormous exception to the mandate of *Fry*, that is, that trial error is to be reviewed "under the 'substantial and injurious effect' standard set forth in *Brecht*, 507 U.S. 619 [], whether or not the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman*, 386 U.S. 18 []." 127 S. Ct. at 2328. Under *Nelson*'s reasoning, anytime there is jury-charge error during the punishment trial of capital-murder trial, it could well be classified as structural, thus abrogating *Fry* for simple instructional error. The concerns and purposes of federal habeas review demand that such cannot be left standing.

CONCLUSION

For the foregoing reasons, this Court should grant the Director's petition for writ of certiorari.

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